No. 89-5961-CFH
Status: GRANTED
CAPITAL CASE

Docketed:
November 7, 1989

Title: Robert Lacy Parker, Petitioner
v.
Richard L. Dugger, Secretary, Florida Department of Corrections, et al.

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Link,Robert J.

Counsel for respondent: Menser,Mark

Entry	Date	Note	Proceedings and Orders
3	Nov 6 1989	P	Application (A89-346) for a stay of execution of sentence of death, submitted to Justice Kennedy.
1	Nov 7 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Nov 7 1989		Response to application (A89-346) filed by Richard L. Dugger, et al..
5	Nov 27 1989		(A89-346) Order of dismissal pursuant to Rule 53 filed.
6	Dec 4 1989		Brief of respondent Dugger in opposition filed.
7	Dec 14 1989		DISTRIBUTED. January 5, 1990
8	Jan 3 1990	X	Reply brief of petitioner Parker filed.
9	May 2 1990		Supplemental brief of petitioner Parker filed.
10	Jun 22 1990		REDISTRIBUTED. June 27, 1990
12	Jun 28 1990		Petition GRANTED.
			**********
13	Jul 30 1990		Joint appendix filed.
14	Aug 13 1990		Brief of petitioner Parker filed.
16	Sep 12 1990		Brief of respondent Dugger filed.
17	Sep 19 1990		CIRCULATED.
15	Sep 25 1990		Record filed.
		*	USCA 11-certified record on appeal
19	Sep 26 1990		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 7, 1990. (1ST CASE)
18	Oct 9 1990	X	Reply brief of petitioner Parker filed.
20	Oct 22 1990		Letter from counsel for petitioner listing supplemental authority received and distributed.
21	Nov 7 1990		ARGUED.

89-5961 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No._____

RECEIVED
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SUPREME COURT, U.S.

ROBERT LACY PARKER,

PETITIONER,

v.

RICHARD L. DUGGER, Secretary, Florida Department of Corrections, and ROBERT A. BUTTERWORTH, Attorney General, State of Florida

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the application of Florida's Jury over-ride standard in an individual case subject to an Eighth Amendment review, and, if so, what standard of review is applicable?

2. Is a valid constitutional claim procedurally barred when a Defendant fails to raise it in state collateral proceedings, despite having raised it in the trial court and on direct appeal?

3. Can a harmless error analysis be applied to an erroneous jury instruction on a theory of defense which applies to one of the two prosecution theories of criminal liability?

4. May a prosecutor always cross examine a defendant about the fact that he consulted with his lawyer during a recess in the trial, or should the prosecutor first be required to proffer a good faith basis for such an interrogation?

5. In a habeas corpus proceeding presenting multiple claims for relief, does an appellate court have jurisdiction to review an order of the district court that does not dispose of all of petitioner's claims?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No._____

ROBERT LACY PARKER,

PETITIONER,

v.

RICHARD L. DUGGER,
et al.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Robert Lacy Parker, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed June 19, 1989.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported as Parker vs. Dugger, 876, F 2d 1470 (11th Cir. 1989). Rehearing was denied on August 17, 1989.

Citations to the Appendix accompanying this Petition are designated A ___. Citations to the transcript in the state trial court are designated as T____. Citations to the state appellate Record on Appeal, which consists of the legal pleadings filed in the state trial court, is designated R____.

JURISDICTION

The judgment and opinion of the Court of Appeals was filed on June 19, 1989, and petitioner's timely petition for rehearing and suggestion of rehearing en banc was denied on August 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right...to have the assistance of counsel for his defence,

the Eighth Amendment to the Constiution of the United States which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,

and the Fourteenth Amendment to the Constitution which provides in relevant part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law.... .

This case also involves Section 921.141, Florida Statutes (1981), A-13; 28 U.S.C. 1291, A-16; Rule 54(b), Fed R. Civ. Procedure, A-17.

STATEMENT OF THE CASE

A. Course of prior proceedings.

Robert Parker was charged with three counts of first degree murder in the shooting deaths of Richard Padgett (Count One), Nancy Sheppard (Count Two), and Jody Dalton (Count Three). At trial, Petitioner's jury found him guilty as charged in Counts One and Two, and guilty of third degree murder in Count Three. At the advisory sentencing proceeding, the jury recommended life sentences for both Counts One and Two. The trial court judge followed the recommendation as to Count One, but overrode the recommendation as to Count Two, and sentenced Petitioner to death. Petitioner received a consecutive fifteen year sentence on Count Three.

The convictions and sentences were affirmed by the Florida Supreme Court on direct appeal. Parker v. State, 458 So.2d 750 (Fla. 1984). A-6. This Court denied Certiorari. Parker v. Florida, 470 U.S. 1088 (1985). The petitioner filed a motion to vacate his convictions and sentence pursuant to Florida Rule of Criminal Procedure 3.850 on May 19, 1986. A death warrant was

signed June 20, 1986. The motion to vacate was denied in the trial court and affirmed on appeal. Parker v. State, 491 So.2d 532 (Fla. 1986). A-4.

The petitioner filed his petition for writ of habeas corpus in the U.S. District Court for the Middle District of Florida on July 12, 1986. The District Court issued a stay of execution and heard oral argument on the petition on July 24, 1986. The court then conducted an evidentiary hearing concerning cash payments by the prosecutor to state witnesses on February 18, 1987. Subsequently, the District Court entered an order denying relief as to Parker's convictions but ordering resentencing by the state trial judge. A-3. The state appealed the District Court's order as to the sentence, and the petitioner cross appealed as to the convictions. On appeal, the Eleventh Circuit affirmed the District Court's ruling as to the petitioner's convictions, and reversed the District Court's order vacating the death sentence. Parker vs. Dugger, 876 F.2d 1470 (11th Cir. 1989). A-1. The petitioner's suggestion for rehearing en banc and petition for rehearing were denied on August 17, 1989. A-2. A second death warrant was signed October 18, 1989, with execution scheduled for November 9, 1989.

B. Facts material to the consideration of the questions presented.

1. Generally

The "facts" as stated in the Eleventh Circuit's opinion are taken from the trial court's sentencing order. They are not supported by the evidence, and the Florida Supreme Court provided a more accurate statement:

> The state introduced evidence at trial that Robert Parker was a drug dealer and Tommy Groover sold drugs for him. Groover had allegedly fronted some drugs to Padgett. When Groover was unable to pay Parker, Parker allegedly threatened to hang Groover unless the debt was satisfied. Testimony indicated Parker was of a violent temperament, had possession of firearms, and was irritated over the drug debt. Uncontroverted evidence showed that Padgett was located at a bar, taken to Parker's junk yard and beaten by Groover and driven into the woods and shot by Groover. Later that same evening, Groover beat and shot Jody Dalton, and Parker helped weight her body and sink it in a lake.

> Finally, Nancy Sheppard, Padgett's 17 year old girl friend, was lured from her home and taken to the ditch where Padgett's body had been left. She was killed by Billy Long, who testified that he was ordered to kill her by Parker, who threatened to kill him in her place unless Long complied. Parker then took Sheppard's necklace and ring from her body.
>
> Parker did not deny being present during these events, but he testified in his own behalf that he had been an unwilling accomplice, forced into co-operation by Groover's threats against Parker's family. He further claimed to have had no indication that Groover planned to kill Padgett or Dalton and that these murders were not part of any common scheme or in furtherance of any common goal. On the contrary, Parker claimed friendship with Padgett and disclaimed more than the slightest acquaintance with either of the women. Parker v. State, 458 So.2d 750, 751-2 (Fla. 1984).

2. Facts relevant to the jury override issue.

In Florida's advisory jury sentencing process, the Florida Supreme Court has devised the Tedder standard for trial judges to apply when the jury recommends a sentence of life imprisonment. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Florida Supreme Court has stated that, in reviewing jury over-rides, it is their duty to examine the record to determine if there was a reasonable basis for the jury recommendation. Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979). A jury life recommendation eliminates the presumption that death is the appropriate penalty when one or more aggravating circumstances are present. Williams v. State, 386 So.2d 538 (Fla. 1980). In other cases, the Florida Supreme Court has analyzed the record to determine what mitigating factors exist that could have influenced the jury to return a life recommendation, even where the trial judge found no mitigating circumstances. Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Richardson v. State, 437 So.2d 1087 (Fla. 1983); Neary v. State, 384 So.2d 881 (Fla. 1980). If there are such mitigating factors, the jury recommendation is reasonable, and a life sentence should be imposed. Id.

At the trial and penalty phase in this cause, the petitioner presented evidence and argued the existence of the following mitigating factors to the jury, all of which have been recognized by the Florida Supreme Court as a reasonable basis for a jury life recommendation that requires reversal of a jury override:

a. The statutory mitigating circumstance that the defendant was under extreme duress or substantial domination of another person. Fla. Stat. 921.141(6)(e). See, Goodwin v. State, 405 So.2d 170 (Fla.1981); Hawkins v. State, 436 So.2d 44 (Fla.1983).

b. The statutory mitigating circumstances that the defendant was under the influence of extreme mental or emotional disturbance, Fla. Stat. 921.141(6)(b), and that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired. Fla. Stat. 921.141(6)(f), due to his alcohol and drug intoxication. Buckrem v. State, 355 So.2d 111 (Fla. 1978); Kampff v. State, 371 So.2d 1007 (Fla.1979); Norris v. State, 429 So.2d 688 (Fla.1983). Amazon v. State, 487 So.2d (Fla. 1986); Fead v State, 512 So.2d 176 (Fla. 1987); Masterson v. State, 516 So.2d 256 (Fla. 1987). Drug or alcohol intoxication has also been been found to be a non-statutory mitigating circumstance. Id.

c. The statutory mitigating circumstance that the defendant was an accomplice in the capital felony and his participation was relatively minor. Fla. Stat. 921.141 (6)(d). The Florida Supreme Court had considered this as either a statutory or non-statutory mitigating circumstance in numerous cases where the defendant was not the actual perpetrator or where there was dispute as to the extent of his participation in the offense. Taylor v. State, 294 So.2d 648 (Fla.1974); Slater v. State, 316 So.2d 539 (Fla.1975); McCaskill v. State, 344 So.2d 1276 (Fla.1977); Malloy v.State, 382 So.2d 1190 (Fla. 1979); Hawkins v. State, 436 So.2d 44 (Fla.1983).

d. Petitioner presented "copious" evidence of non statutory mitigation. Parker v. Dugger, 876 F.2d 1470, 1475 n.7

(11th Cir.1989). This included evidence of Petitioner's upbringing which showed that Petitioner was raised in a very close family in which he contributed his share of "chores" (T.2231-2). The evidence showed that Petitioner's father was an alcoholic who beat his mother in Petitioner's presence. (T. 2322-3). Petitioner's father began giving the Petitioner alcoholic beverages and taking him to bars at an early age. (T.2323-4). Robert Parker began dating Elaine, his co-defendant in this case, when he was only fourteen years old and Elaine was sixteen years old. (T.2325). Robert married Elaine when he was sixteen, because she was pregnant. (T.2326-7). Elaine supported Robert and their baby with money from her job; Robert was unemployed and took care of his baby son and later his baby daughter. (T.2327-30). The evidence showed that Elaine introduced Robert to the use of illegal drugs. (T.2357-8). Robert developed a drug and alcohol problem and sought professional help, but Elaine was not supportive. (T.2330). Elaine was the dominant figure in the relationship. (T.2333,2361). Petitioner was primarily a house husband while his wife worked. (T.2358-9). Robert had been so distraught over their marital problems that he attempted suicide when Elaine left him. (T.2332). The Petitioner had always been a good father to his children and maintained a very close relationship with them. (T.2338-9,2342-4,2346,2351-2,2361). Petitioner had a son, Robbie, age eleven at the time of the trial, and Allison, age nine at the time of the trial. The children were introduced to the jury. (T.2338-9). The evidence also showed that Petitioner had gone out of his way on numerous occasions to help his relatives and neighbors. This included taking a neighbor's husband to the hospital three or four times a month for over a year for radiation therapy, as a favor and without reimbursement. (T.2346-8). Such character and background evidence is normally considered a reasonable basis for a jury life recommendation. See, Jacobs v. State, 396 So.2d 713 (Fla.1981); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Washington v. State, 432 So.2d 44 (Fla. 1983); Wasco v. State, 505 So.2d 1314 (Fla.1987).

e. The non-statutory mitigating circumstance that the jury could have believed petitioner's testimony as to his lesser culpability and still found him guilty. Malloy v. State, 382 So.2d 1190 (Fla. 1979); Gilvin v. State, 418 So.2d 996 (Fla. 1982); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Spivey v. State, 529 So.2d 1088 (Fla. 1988).

f. The non statutory mitigating circumstance that the principle of equal justice required a life sentence because none of the co-defendants had been sentenced to death for the Sheppard murder. The evidence showed that Groover, the perpetrator in the murders of Padgett and Dalton, was sentenced to death for those murders, but to life for the murder of Nancy Sheppard. Billy Long, who actually perpertrated the Sheppard murder by shooting her five times, was allowed to plead guilty to second degree murder and is eligible for parole. Elaine Parker, who owned the car and gun, drove the car, lured Sheppard out of her home, and gave Long the murder weapon, was also allowed to plead guilty to second degree murder. Under such circumstances, the Florida Supreme Court has, in other cases, routinely ruled that a life recommendation is reasonable.

> This court has upheld the reasonableness of jury recommendations of life which could have been based, to some degree on the treatment accorded one equally culpable of the murder. McCampbell v. State, 421 So.2d 1072 (Fla. 1982). In such cases we have reversed the Judge's decision to override the recommendation when the accomplice was a principle in the first degree; Herzog v. State, 439 So.2d 1372 (Fla. 1983); McCampbell v. State; when the accomplice was the actual trigger man; Barfield v. State, 402 So.2d 377 (Fla. 1981); Slater v. State, 316 So.2d 539 (Fla. 1975); when the evidence was equivocal as to whether defendant or the accomplice committed the actual murder; Smith v. State, 403 So.2d 933 (Fla. 1981); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Halliwell v. State, 323 So.2d 557 (Fla. 1975); or when the accomplice was the controlling force instigating the murder; Stokes v. State, 403 So.2d 377 (Fla. 1981); Neary v. State, 384 So.2d 881 (Fla. 1980). Quoted from Eutzy v. State, 458 So.2d 755, 759 (Fla. 1984).

Had this principle been applied consistently to Petitioner's case, where the evidence was in sharp dispute as to the extent of Robert Parker's participation in any of the homicides, the Florida Supreme Court should have reduced this sentence to life

imprisonment. See, also, Hawkins v. State, 436 So.2d 44 (Fla. 1983); Brookings v. State, 495 So.2d 135 (Fla. 1986); DuBoise v. State, 520 So.2d 260 (Fla. 1988); Caillier v. State, 523 So.2d 158 (Fla. 1988); Harmon v. State, 527 So.2d 182 (Fla. 1988); Spivey v. State, 529 So.2d 1088 (Fla. 1988).

After hearing this evidence, the jury returned a specific verdict form in which they found that there were sufficient aggravating circumstances to justify a death sentence, but that the mitigating circumstances outweighed the aggravating circumstances and, therefore, the jury recommended life. A-8. Despite this recommendation with a clear finding of the existence of mitigating circumstances, the trial court judge found six statutory aggravating circumstances, no mitigating circumstances, and sentenced petitioner to death. On direct appeal, the Florida Supreme Court vacated two of the aggravating circumstances, but affirmed the jury override because the trial judge found no mitigating circumstances. Parker v. State, 458 So.2d 750, 754, (Fla. 1984). In his habeas corpus petition, petitioner alleged that the Tedder standard of review of jury overrides had been applied in his case in an arbitrary, capricious and disproportionate manner. The Attorney General's position was that the application of the Tedder jury override standard was purely a matter of state law and not subject to federal review. The District Court agreed with petitioner, ordered his death sentence set aside, and ordered a resentencing by the state trial court judge. The State appealed, and again argued that the application of the Tedder standard was purely a matter of state law, not subject to federal review. The Eleventh Circuit agreed that the application of the Tedder standard by the Florida Supreme Court is subject to federal review, but disagreed that it had been arbitrarily and capriciously applied in this case. Parker v. Dugger, id. at 1473-6.

3. Facts Relevant to Procedural Default Issue

In Stromberg v. California, 283 U.S. 359 (1931), this court stated the rule that the due process clause to the Fourteenth Amendment requires that a general guilty verdict be

set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of the grounds is insufficient, because the verdict may have rested exclusively on that ground. See, Zant v. Stephens, 462 U.S. 862, 882 (1983). At the charge conference in petitioner's trial, the prosecutor requested that the jury be instructed as to the law of first degree felony murder, as to both counts one and two, arguing that the applicable felony in count one was kidnapping and, in count two, robbery. A-10. Petitioner objected to the felony murder instruction as being unsupported by the evidence. A-10. During summation, the prosecutors repeatedly argued that the petitioner was guilty of first degree murder in counts one and two, even if his own testimony was accepted as true, because of the felony murder rule, and because duress was not a defense. (See number 4 below). (T.2148-9, 2153, 2264, 2274-5). The jury was instructed as to first degree felony murder in counts one and two, (R.388), and returned general verdicts of guilty. A-9. On direct appeal, the Florida Supreme Court held that the evidence of the underlying felony as to count two was insufficient. Parker v. State, 458 So.2d 750, 754 (Fla. 1984). In affirming petitioner's conviction, the court said, "In addition to considering all other issues raised on appeal, we have conducted an independent review of the record on trial and found no reason to award a new trial." Id. As the District Court noted, this issue was "clearly raised" at trial and "the Florida Supreme Court could not have overlooked" the issue. A-3. Petitioner then filed a Motion for Rehearing with the Florida Supreme Court, pointing out that the felony murder instruction could have caused the jury to convict petitioner on a theory of guilt that was unsupported by the evidence. A-11. Rehearing was denied without opinion.

The Eleventh Circuit panel declined to reach the merits of this claim, however, and inexplicably found that the issue had never been raised in the state court. Parker v. Dugger, at 1477. The panel opinion stated, alternatively, that even if the issue had been raised in state court on direct appeal, it was procedurally barred because it had not been raised in state collateral review. Id, at 1477 n.10.

4. Facts relevant to the jury instruction issue

The State's theory of prosecution as to Count Two, the murder of Nancy Sheppard, was in the alternative: premeditated murder, or felony (robbery) murder. The jury was instructed on felony murder over objection. (See number three above). The prosecutor argued felony murder in his summation, (T.2274-5), as well as premeditated murder. At the charge conference in this cause, the defendant requested that the jury be instructed on the defense of duress, (T.2087-90). The state objected and requested the court give an instruction that duress is not a defense to homicide, at all. (T.2093-6). A-12. This instruction was granted and given despite petitioner's objection that duress is a defense to felony murder,if not to intentional murder. (T.2119-22, 2265-6). During summation, the prosecutors argued that the defendant was guilty, even if his testimony was believed, because duress was not a defense to homicide. (T.2147-9, 2153).

Duress or coercion has long been recognized as a proper defense in Florida. Hall v. State, 136 Fla. 644, 187 So.392 (1939). Duress is not a defense, however, that is available to the perpretator of an intentional homicide. Wright v. State, 402 So.2d 493 (Fla. 3rd DCA 1981); Cawthon v. State, 382 So.2d 796 (Fla.1st DCA 1980). These cases left open the question of duress as a defense to felony murder. See, Chestnut v. State, 505 So.2d 1352, 1354 (Fla. 1st DCA 1987). It is, however, settled that duress is a defense to robbery, the underlying felony in this case. Koontz v. State, 204 So.2d 224 (Fla. 2nd DCA 1967). The Florida Supreme Court has assumed, without deciding, that duress is a defense to felony murder. See, Goodwin v. State, 405 So.2d 170 (Fla. 1981); Hawkins v. State, 436 So.2d 44 (Fla. 1983). Indeed, the Florida Supreme Court noted that petitioner's defense was duress, and incorrectly indicated that the jury rejected this defense in reaching its verdict. Parker v. State, 458 So.2d 750, 753 (Fla. 1984). Though it was raised on direct appeal, the Florida Supreme Court did not note that the incorrect instruction by the trial court had made the duress defense impossible to assert, and did not even discuss the issue.

The Eleventh Circuit ruled that petitioner's requested instruction was misleading because it implied that duress was a defense to intentional murder as well as to felony murder. Parker v. Dugger, at 1479. The lower court failed to note that petitioner had requested a qualifying instruction that duress was a defense only to felony murder. A-12. Regardless, the state's requested jury instruction that duress could never be a defense to murder was equally misleading and should not have been given. The trial court effectively directed a verdict of guilt by telling the jury that duress was not a defense. In light of the jury's life recommendation (See number two above), it is probable that the petitioner's duress defense was accepted, but that the jury convicted because of the court's instructions. Based on the trial court's instructions, the jury had to find petitioner guilty if it believed that he participated out of duress. The record clearly demonstrates that a legally correct instruction (i.e. that duress was only a defense to felony murder) was requested, and that a legally incorrect instruction (i.e. that duress was not a defense at all) was given. The effect of the Eleventh Circuit's decision is to find that the legally incorrect instruction given by the trial court was harmless because it was legally correct as to one of the theories of prosecution. The end result is the possibility, if not the probability, that petitioner was convicted based on a legal theory that was not supported by the evidence and an incorrect instruction that his defense could not be considered.

5. Facts Relevant to Cross-Examination Issue

In Geders v. U.S., 425 U.S. 80 (1976), this Court held that it violated a defendant's Sixth Amendment right to counsel to prohibit him from consulting with his lawyer during an overnight recess in the trial. The Court noted that a prosecutor could cross-examine a defendant as to the extent of any "coaching" during the recess, subject to the control of the Court. Id., at 89. This Court at that time had no reason to address the permissible nature of such an examination. This case, however, demonstrates the need for guidance in this area.

In the trial court below, trial counsel was permitted to confer with the defendant during a brief recess in the defendant's cross-examination. This is a right that had been established by state as well as federal law. Bova v. State, 410 So.2d 1343 (Fla. 1982). However, neither the defendant nor his counsel had any idea that the mere fact that he had exercised this right would be used to impugn his credibility. The prosecutor proceeded as follows:

Q: All you have done for the last year is think about this, isn't it?
A: I thought about it, yes.
Q: You are well-coached, aren't you?
A: No, sir.
Q: He's been coaching you day in and day out, hasn't he?
A: He's talked to me, he hasn't been coaching me.
Q: He even talked to you today during the recess, didn't he?
(Objection over-ruled)
Q: You even talked to him during the recess a little while ago, didn't you?
A: Yes sir, I did.
(Objection over-ruled)
Q: You have talked to him hundreds of times, haven't you?
A: Yes sir, several times.
Q: Several, three?
A: No, sir.
Q: More liked a hundred?
A: Probably.

(A.14)

The Eleventh Circuit dismissed this claim, stating that the prosecution may cross-examine a defendant as to the extent of any coaching during a recess, "subject to the control of the trial judge." Parker v. Dugger, at 1480. With this general principle there can be no dispute, but without guidance from this Court, an examination such as the one above could occur in virtually every criminal trial where a defendant consults with counsel during a recess. It is a generic cross-examination in which the defendant is not even asked whether any coaching occurred during the recess, or even what was discussed during the recess. The accusation of coaching is made, then the fact that the defendant met with counsel during the recess is made known, as if to confirm that coaching did occur, and to infer that there is some impropriety in talking during a recess. There was no attempt by the prosecutor to find out what actually had transpired during the recess. The prosecutor was not required to state the basis

of his belief that coaching had occurred nor did he proffer any facts to support the accusations he made. This was not an attempt to determine if there was any impropriety. It was an attempt to infer impropriety from the mere fact of consultation with defense counsel.

6. Facts relevant to Jurisdictional Issue

In his habeas corpus petition, Robert Parker raised fifteen claims for relief. The U.S. District Court denied relief on twelve of the claims, but ordered resentencing on the ground that the trial judge's override of the jury's life recommendation, and its affirmance by the Florida Supreme Court, was an arbitrary application of the Tedder jury override standard. A-3. The District Court did not reach two of the claims in the habeas petition because they related solely to the constitutionality of the death sentence and, as such, the Court believed they could be presented to the state courts at resentencing. A-3.

Petitioner's death warrant was signed on October 18, 1989, soon after rehearing was denied in the Eleventh Circuit. Petitioner filed an Emergency Motion for Recall of Mandate and Stay of Execution Pending Remand to District Court on October 30, 1989. This Motion challenged the jurisdiction of the Eleventh Circuit to re-instate Petitioner's death sentence. Said Motion was denied by order dated November 2, 1989. A-15.

REASONS FOR ALLOWANCE OF THE WRIT

1. JURY OVERRIDE ISSUE

In Spaziano v. Florida, 468 U.S. 447 (1984), this court upheld the constitutionality of Florida's jury override scheme, in part because of the "significant safeguard" accorded capital defendants by the Tedder standard, and in part because meaningful appellate review by the Florida Supreme Court reduced the likelihood that the death penalty would be imposed in an arbitrary or discriminatory manner. Id, at 465, 466. This Court further found no indication that the application of the jury override procedure resulted in the unconstitutional application of the death penalty in general, or in the case before it. Id, at 466. This Court, however, left open the questions as to whether the application of the Tedder standard in a particular case would be subject to federal review after Spaziano, and, if so, what standard of review would be utilized. Spaziano was decided on July 2, 1984. Petitioner's conviction was affirmed by the Florida Supreme Court on September 6, 1984. In petitioner's habeas petition, he alleged that the Florida Supreme Court had changed its application of the Tedder standard after the Spaziano decision, alleging that the Florida Supreme Court had reviewed 62 jury overrides prior to Spaziano and upheld only 18 of them, but that the court had upheld 10 out of 17 overrides after Spaziano. Recent decisions of the Florida Supreme Court have confirmed petitioner's allegations, if not his statistics. In Cochran v. State, 547 So.2d. 928 (Fla. 1989), the Florida Supreme Court flatly stated that its application of the Tedder standard had changed:

> ...as Justice Shaw noted in his special concurrence to Grossman v. State, 525 So.2d 833, 851 (Fla. 1988)(Shaw, J., specially concurring): During 1984-85, we affirmed on direct appeal trial judge overrides in 11 of 15 cases, 73%. By contrast, during 1986 and 1987, we have affirmed overrides in only 2 of 11 cases, less than 20%. This current reversal rate of over 80% is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation...
>
> Clearly, since 1985, the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ", Tedder 322 So.2d at 910. Cochran, Id, at 933

The Florida Supreme Court has also noted that its standard of review of capital sentences has changed since this Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987).

> Hitchcock rejected a prior line of cases issued by this court, which had held that the mere opportunity to present non statutory mitigating evidence was sufficient to meet Lockett requirements. Under this "mere presentation" standard we routinely declined to consider whether the judge or jury actually weighed the evidence in question. Downs v. Dugger, 514 So.2d 1069, 1071, (Fla.1987).

This explains the Florida Supreme Court's failure to acknowledge the extensive mitigating evidence presented to the judge and jury in Parker's case. The Florida Supreme Court did not, at the time of petitioner's direct appeal, require that the trial judge and jury consider non-statutory mitigating circumstances, only that a defendant be permitted to present it. However, the right to have the advisory jury consider non-statutory mitigating evidence would be vitiated if such evidence could not form a reasonable basis for a life recommendation. "The right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration." Franklin v. Lynaugh, 108 S.Ct. 2320, 2333 (1988) (O'Connor, Jr., concurring).

The Florida Supreme Court has thus conceded that it not only applied Tedder in an inconsistent manner during the period it decided petitioner's appeal, it has also conceded that it applied a constitutionally deficient standard of review of non-statutory mitigating circumstances during the same period. The trial judge's decision to override the jury's life recommendation, and the Florida Supreme Court's decision affirming the override, were arbitrary because they were inconsistent with both Hitchcock, and the Florida Supreme Court's own application of the Tedder standard.

The trial court's sentencing order affirmatively states that the court found no mitigating circumstances. A-7. The District Court noted that it appeared that the trial judge violated Hitchcock in petitioner's case by failing to consider non-statutory mitigating circumstances in over-riding the jury. A-

3. Remarkably, in direct contradiction to the holding of the Florida Supreme Court, the Eleventh Circuit held that the trial judge did find non-statutory mitigating factors to be present. Parker v. Dugger, id. at 1475.

It is significant that, before Hitchcock, this trial judge had never found a mitigating circumstance when imposing a death sentence. See, Barclay v. Florida, 463 U.S. 939 (1983), (dissenting opinion of J.Marshall). Indeed, Judge Olliff did not even find a mitigating circumstance in imposing a life sentence for the Padgett murder! A-7. This Court is well aware that this judge is not adverse to over-ruling a jury's mercy recommendation. Barclay, id.; Dobbert v. Florida, 432 U.S. 282 (1977). Judge Olliff's practice of finding no mitigating circumstances in sentencing a defendant to death supports the conclusion that findings of aggravating and mitigating circumstances in override cases are seen more by the judge as an effort to justify, rather than to direct, the sentencing decision. See, Radelet, "Rejecting the Jury,"18 U.C. Davis L. Rev. 1409, 1414 (1985). Indeed, the sentencing practices of judges in Jacksonville generally, ("the death penalty capital of the United States"), and Judge Olliff, in particular, have acquired a good deal of notoriety for just this reason. See, Geimer & Amsterdam, "Why Jurors Vote Life or Death," 15 Am.J.Crim.Law 1,7-8, 19-20 (1988); Geimer, "Death at Any Cost," 12 F.S.U. L. Rev. 737, 774 (1985).

As the District Court noted, the stated reason for sentencing Parker to death for the murder of Sheppard and not Padgett was that ..."the shooting and throat cutting and robbery of the helpless 17-year old girl was so heartless and atrocious as to indicate a murderer without conscience or pity."A-7. However, Padgett's murder also included shooting, stabbing, and throat cutting. Furthermore, the Florida Supreme Court ruled that there was no robbery in the Sheppard murder, and that the Sheppard murder was not atrocious. The trial judge's remaining consideration, that the victim was a "helpless 17-year old girl," demonstrates an improper consideration of the character of the

victim. South Carolina v.Gathers, 109 S.Ct. 2207 (1989). The District Court recognized that such considerations would be improper under this Court's ruling in Booth v. Maryland, 482 U.S. 496 (1987), and noted that the only evidence that the trial judge heard that the jury did not was testimony from relatives of the victims, asking the court to impose the death penalty. A-3.

To summarize, Robert Parker's death sentence was imposed despite a life recommendation from a jury that was presented with substantial and, in most instances, uncontradicted evidence of mitigating circumstances that had been previously recognized by the Florida Supreme Court. The trial judge heard impermissible victim impact testimony, made no mention of the non-statutory mitigation that had been presented, and sentenced Petitioner to death. The Florida Supreme Court affirmed the over-ride during a period when, by its own admission, the Court was applying the Tedder standard in an inconsistent manner, and when its standard of review of Hitchcock errors was defective. The U. S. District Court noted these problems and set aside the death sentence. The Eleventh Circuit then reversed the District Court, stating that the trial judge did find non-statutory mitigation (despite the Flordia Supreme Court's pronouncement to the contrary), and applied a constitutionally deficient Eighth Amendment standard of review.

The Eleventh Circuit agrees that the application of the Tedder standard is subject to federal scrutiny, but appears to apply an abuse of discretion standard of review. In other words, the appellate court has adopted a standard whereby the court examines the record to see if it can find any reason for the judge to overrule the jury recommendation, and if such a reason can be found, the override is held to be "non arbitrary". This, however, is not an Eighth Amendment analysis such as that conducted by this Court in the past. In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court evaluated the application of an aggravating circumstance in Georgia's death penalty scheme to determine if it was being applied in an arbitrary and capricious manner. In so doing, this Court undertook an extensive analysis

of the application of that aggravating circumstance in other Georgia Supreme Court opinions. Such an analysis was necessary to determine whether the aggravating circumstance had been applied in an arbitrary or capricious manner to Mr. Godfrey. This Court then found that the circumstance had been unconstitutionally applied because "there is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id, at 433. In Maynard v. Cartwright, 108 S.Ct. 1853 (1988), this court approved the manner in which the Tenth Circuit had concluded that an aggravating circumstance had been unconstitutionally applied. The Tenth Circuit in Maynard had performed an analysis similar to that of this court in Godfrey. Most importantly, this court rejected ..."the (state's) submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty..." Maynard id, at 1859.

If the Godfrey - Maynard standard of review is applied, it is clear that the death sentence must fall, because there is no principled way to distinguish this case in which the jury override was sustained, from the many cases in which it was not. Indeed, in no other Florida case has a jury override been sustained where a perpertrator was given a plea bargain for a lesser sentence and an aider and abettor who killed no one received the death sentence. This court should grant certiorari because the Eleventh Circuit has decided an issue left unresolved by this court in Spaziano, and has utilized a standard of review that is inconsistent with the Eighth Amendment as interpreted by this court in Godfrey and Maynard. Even though the Florida Supreme Court has conceded that the Tedder standard was being applied in an inconsistent fashion in 1984 and 1985, petitioner can hope for no relief from the present Florida Supreme Court. See, Johnson v. Dugger, 523 So.2d 161(Fla. 1988). This is an issue that has previously been brought to this Court's attention but left undecided. See, Heiney v. Florida, 469 U.S. 920 (1984)

Eutzy v. Florida, 471 U.S. 1045 (1985); Engle v. Florida, 108 S.Ct. 1094 (1988). It is an issue that will continue to appear until it is resolved by this Court.

Moreoever, it is an issue very similar to the issue presented in Ricketts v. Jeffers, No. 89-189, cert. granted 46 Cr.L.Rptr. 3029 (Oct. 11, 1989). In Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), the court of appeals analyzed the Arizona Supreme Court's application of the Arizona heinous or depraved aggravating circumstance. The court determined that the facts of that case fell so far outside the standard developed by the Arizona Supreme Court for determining whether conduct was heinous or depraved that it would be arbitrary and capricious to apply the aggravating circumstance to Jeffers. Id. at 486. The court of appeals explicitly rejected the notion that its review was limited to "determining whether a rational factfinder could have determined Jeffers' crime to have been heinous or depraved." Id. at 486 n.9.

In the instant case, the Eleventh Circuit applied the exact opposite of the Ninth Circuit's analysis in Jeffers. Rather than review the Florida Supreme Court's application of the Tedder jury override standard to determine whether the affirmance of the override in Parker's case was so inconsistent as to be arbitrary and capricious the Eleventh Circuit simply reviewed the record to see if there was any possible basis for the override decision, explicitly rejecting the district court's analysis, which was analogous to that of the court of appeals in Jeffers. Parker v. Dugger, 876 F.2d at 1474-76. Accordingly, the rationales of the courts in Parker and Jeffers are in direct conflict, and the issue on which this Court took certiorari in Jeffers is necessarily presented in this case.

2. Procedural Default Issue

The panel opinion involves both a misapplication of, and a misinterpretation of, this court's decision in Harris v. Reed, 109 S.Ct. 1038 (1989). This court in Harris held that the "plain statement" rule applies to federal habeas proceedings. Clearly, there was no plain statement from the Florida Supreme

Court that the due process issue was procedurally barred. The panel opinion finds procedural bar, however, because petitioner did not raise this issue in state collateral proceedings. Because the last state court rendering judgment in this case was the Florida Supreme Court's decision affirming the denial of petitioner's state collateral attack on his conviction, the Eleventh Circuit found procedural bar as to this issue. Parker v.Dugger, at 1477. This court should grant the Writ to clarify what it meant in Harris by "the last state court rendering judgment in the case," Harris, id, at 1043. In other words, if a habeas petitioner raises an issue on direct appeal in state court, and then raises other issues in collateral review in state court, will he be procedurally barred from raising the issues he raised on direct appeal in federal habeas if he did not raise them again in state collateral review, where the state court on direct appeal failed to address the issue? The Eleventh Circuit's decision in this case conflicts with this court's decision in Harris, and creates an unfortunate, if not dangerous, interpretation of the "last state court rendering judgment in the case".

3. Jury Instruction Issue

The Fourteenth Amendment to the United States Constitution guarantees defendants a meaningful opportunity to present a defense; an essential component of procedural fairness is an opportunity to be heard. Crane v. Kentucky 476 U.S. 683 (1986.) Other circuit courts of appeal have not failed to intervene in state criminal convictions where the trial court failed to properly instruct on a valid defense, or on the elements of the crime. In Kibbe v. Henderson, 534 F.2d 493 (2nd Circuit 1976), where cause of death was raised as a defense to a murder charge, the failure of the trial court to properly instruct on causation was held to violate due process. In U.S. ex rel Means v. Solem, 646 F.2d 322 (8th Cir. 1980), a due process violation was found where the trial court erroneously ruled that self-defense was not available to the offense charged. In Glenn v. Dallman, 686 F.2d 418 (6th Cir. 1982), the

failure to instruct a jury on an essential element of the crime charged was held to violate due process. In Plunkett v. Estelle, 709 F.2d 1004 (5th Cir. 1983), jury instructions that permitted the jury to convict the defendant upon a non-charged theory of murder was held to violate due process. A due process violation was found where a state trial court had erroneously ruled that duress was not a defense to murder in U.S. ex rel Reed v. Lane, 759 F.2d 618 (7th Cir. 1985). In this case, the due process violation is more egregious than in any of those above cited. The trial court not only failed to instruct the jury that duress was a defense to felony murder, it affirmatively instructed the jury that duress was not a defense. Not only was the jury here incorrectly instructed that they could convict petitioner on a felony murder theory that was unsupported by the evidence, they were also incorrectly told that petitioner's defense to that theory could not be considered.

This Court has repeatedly held that due process requires the state to prove every element of a charged offense beyond a reasonable doubt, and that jury instructions that have the effect of relieving a state of their burden violate a defendant's due process rights. Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). "Such directions subvert the presumption of innocence accorded to accused persons, and also invade the truth-finding task assigned solely to juries in criminal cases." Carella v. California, 109 S.Ct. 2419, 2420 (1989). Here, the State was relieved of its burden of proving that Petitioner had any intent to kill by the giving of the felony-murder instruction. The state was then relieved of its burden of proving that the Petitioner had the requisite intent to participate in the underlying felony of robbery by the giving of the "duress is not a defense" instruction. The end result is that Petitioner may have been convicted of first degree murder without any jury finding that he either intended to kill or intended to participate in a robbery.

That the petitioner was prejudiced by these erroneous instructions cannot reasonably be doubted. The jury's acceptance

of the duress evidence was a likely basis for the jury's life recommendation. Petitioner denied assisting with or participating in the murder of Nancy Sheppard, admitting only presence at the scene. However, he did not deny taking Ms. Sheppard's necklace and ring after the homicide was completed. On this evidence, the jury could have believed the petitioner's trial testimony, and still convicted him on a robbery murder theory, after being told that duress was not a defense. Given the paucity of evidence to rebut petitioner's duress defense, a legally correct duress instruction could have resulted in petitioner's acquittal as to this count. Had the jury not been incorrectly instructed on felony murder as to this count, petitioner might likewise have been acquitted. This is not fanciful speculation. The state argued vigorously that the jury should convict Robert Parker of first degree murder even if it believed his testimony. (T.2147-9, 2153). This court should grant Certiorari as to this issue in order to correct what will otherwise be a grave miscarriage of justice.

4. Cross-Examination Issue.

This Court has previously held that it is fundamentally unfair, and a violation of due process, to provide an accused with a constitutional privilege, and then to penalize him for its use at trial. Doyle v. Ohio 426 U.S. 610, (1976); Johnson v. U.S., 318 U.S. 189 (1943). Here, the defendant asserted his right to consult with counsel during the recess, and the Court permitted the consultation. The consultation might well have never occurred, however, had the defendant and counsel been aware of the way they would be attacked for using it.

The opinion in Geders provides little guidance as to how a prosecutor can cross-examine about the extent of improper coaching, without making the consultation with counsel itself appear improper, and without infringing on the attorney-client privilege. As this Court has noted, lawyers confer with their clients during breaks in their testimony frequently, Perry v. Leeke, 109 S.Ct. 594, 598 n.2 (1989). Recently, in U.S. v.

Zolin, 109 S.Ct. 2619 (1989), this Court held that a judge should require a showing of a factual basis adequate to support a "good faith belief by a reasonable person" before performing even an in-camera inspection of privileged material, to determine if the crime fraud exception to the attorney-client privilege should permit their disclosure. Id. at 2631. It would seem that communications during trial should receive at least equivalent protection. However, Geders can be read to mean that a prosecutor can ask virtually anything about a recess consultation, and that the attorney-client privilege does not apply to communications had during the recess.

Unless this Court offers guidance, the "generic cross" described above will be utilized routinely and the right to consult with counsel during a trial recess will become too costly a right to exercise.

5. Jurisdictional Issue

Review by a federal appellate court is limited to "all final decisions of the district courts of the United States". 28 U.S.C. 1291. A final decision generally is one which ends litigation on the merits and leaves nothing for the court to do but execute the judgment. Catlin v. U.S., 324 U.S. 229 (1945). An order granting a writ of habeas corpus is therefore not appealable unless it disposes of all of the Petitioner's claims. See, Andrews v. U.S., 373 U.S. 334, 340 (1963).

Here, the district court's order expressly did not dispose of all of petitioner's claims. Though neither party raised the issue, it is the duty of the appellate court to satisfy itself as to its jurisdiction to consider an appeal, whether or not it is raised by the parties. See, Collins v. Miller, 252 U.S. 364, 365-6, (1920). The Eleventh Circuit apparently based its jurisdiction on its decisions in Blake v. Kemp, 758 F.2d 523 (11th Cir 1985), and Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). In Blake, the appellate court held that an order granting a writ of habeas corpus and ordering a new trial was a final judgment within the meaning of 28 U.S.C. 1291, even though the order did not resolve all of the claims in the habeas petition.

Id., at 525. In Wilson, the appellate court extended the rule in Blake to permit appeals from orders granting new sentencing proceedings, even though not reaching other sentencing claims.

These decisions are in direct conflict with the decisions of the Eighth Circuit. In Stewart v. Bishop, 403 F.2d 674 (8th Cir. 1968), it was held that, when a district court grants habeas relief to a petitioner on some, but not all, of the claims presented for consideration, the court of appeals does not have jurisdiction to review the district court's decision unless its order also finally disposes of the remaining claims. In Gray v Swenson, 430 F.2d 9 (8th Cir. 1970), the court cited Stewart with approval and interpreted Rule 54(b), Fed.R.Civ.P, to prohibit appeals when all habeas claims are not finally decided by the district courts order. This conflict between the Eighth and Eleventh Circuits has been noted by the Second Circuit in Bermudez v. Smith, 797 F.2d 108 (2nd Cir. 1986), though the Second Circuit avoided having to decide which school of thought to follow. At least one member of this Court has also noted the conflict. See, Kemp v. Blake, cert. denied, 474 U.S. 998 (1985) (White, J., dissenting).

This is an issue that will continue to occur, as demonstrated by this case. Petitioner is now in the posture of having motions for stay of execution pending before this Court, and the District Court, based on the same habeas petition, but on different grounds. Indeed, Petitioner will necessarily have to litigate the remaining claims before the District Court, the appellate court, and, possibly, before this Court. Petitioner will have two rounds of appeals from the same habeas petition. If this issue as to what constitutes a final judgment in an order granting habeas relief is not resolved, such piecemeal litigation is likely to occur in other cases. More significantly for Petitioner, if the Eleventh Circuit had no jurisdiction over his appeal, the decision to re-instate his death sentence must be voided.

WHEREFORE, Plaintiff prays this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Mark Menser, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, by U.S. Mail, this 6 day of November, 1989.

Attorney

H 1/5

Supreme Court, U.S.
FILED
DEC 4
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

Case No. 89-5961 (3)

ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the application of Florida's jury override standard in an individual case subject to an Eighth Amendment review and, if so, what standard of review is applicable?

2. Is a valid constitutional claim procedurally barred when a defendant fails to raise it in state collateral proceedings, despite having raised it in the trial court and on direct appeal?

3. Can a harmless error analysis be applied to an erroneous jury instruction on a theory of defense which applies to one of the two prosecution theories of criminal liability?

4. May a prosecutor always cross-examine a defendant about the fact that he consulted with a lawyer during a recess in the trial, or should a prosecutor first be required to proffer a good faith basis for such an interrogation?

5. In a habeas corpus proceeding presenting multiple claims for relief, does an appellate court have jurisdiction to review an order of the district court that does not dispose of all of Petitioner's claims?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

Case No. 89-5961

ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Respondent, Richard L. Dugger, submits that Robert Lacy Parker's Petition for Writ of Certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals entered, on denial of rehearing, on August 17, 1989, should be denied.

OPINION BELOW

The opinion of the Eleventh Circuit is reported as **Parker v. Dugger**, 876 F.2d 1470 (11th Cir. 1989).

We adopt the Petitioner's citation system as set forth in his petition.

JURISDICTION

Mr. Parker's statement is accepted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mr. Parker's statement is accepted.

STATEMENT OF THE CASE

(i) Course of Proceedings

Robert Lacy Parker was convicted of two counts of first degree murder and one count of third degree murder, respectively, for his slaying of Richard Padgett, Nancy Sheppard and Jody Dalton.

For the Sheppard murder, Parker was sentenced to death. Parker received a life sentence for the Padgett murder and fifteen years (consecutive) for the Dalton murder.

The convictions and sentences were upheld in **Parker v. State**, 458 So.2d 750 (Fla. 1984). Certiorari was denied. **Parker v. Florida**, 470 U.S. 1088 (1985).

Mr. Parker filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. Relief was denied, Parker appealed, but lost. **Parker v. State**, 491 So.2d 532 (Fla. 1986).

Mr. Parker filed a petition for writ of statutory "habeas corpus" pursuant to 28 U.S.C. §2254. Mr. Parker was granted relief as to his sentence but was denied relief as to his conviction. Both parties appealed to the Eleventh Circuit.

The Eleventh Circuit reversed the District Court's decision granting relief as to Parker's sentence but affirmed the District Court's denial of relief as to the conviction. **Parker v. Dugger**, 876 F.2d 1470 (11th Cir. 1989). Rehearing was denied and this action ensued.

(ii) Statement of the Facts

Although Mr. Parker disagrees with the factual conclusions reached by the Eleventh Circuit, the Respondent does not. The Respondent notes, however, that the Florida Supreme Court decision partially quoted by Mr. Parker also states:

> The trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied. In light of these findings, the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. **Tedder v. State**, 322 So.2d 908 (Fla. 1975). The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty has been found appropriate.

Parker v. State, 458 So.2d 750, 754 (Fla. 1984).

Mr. Parker has offered five distinct issues. The facts relevant to each are set forth in order.

(1) Facts: Question I
(The jury override issue)

As noted by the Eleventh Circuit, the United States District Court granted habeas corpus relief to Mr. Parker by resentencing Mr. Parker under its own independent, reapplication of the judicially crafted "**Tedder** Rule".

The District Court attempted to justify its role as a "state sentencing court" by holding that the Florida Supreme Court's application of its rule was "broad" and "vague" and therefore arbitrary and capricious. The circuit court held:

> The district court decision suggests that its grant of relief was influenced by dissatisfaction with the Florida Supreme Court's application of the **Tedder** standard to the facts in this case. **Spaziano** warns, however, that federal review for the arbitrary or discriminatory imposition of the death penalty must not devolve into second-guessing the Florida courts on questions of state law particularly on whether the trial judge complied with the mandates of **Tedder**.

Parker v. Dugger, 876 F.2d 1470, 1475 (11th Cir. 1989).

Mr. Parker's petition lists certain factual averments he refers to as "mitigating factors". Although this Honorable Court is not a sentencing court, the Respondent would still note:

> (a) Mr. Parker was a leader of a small time drug-pushing operation and was not dominated by anyone, especially his employee and co-defendant, Tommy Groover. These murders were committed to terrorize Parker's debtors and enhance his reputation as a tough dope dealer. After Parker had Ms. Sheppard shot, he personally slit her throat. **Parker, supra**, at 1472.
>
> (b) Mr. Parker was not too drunk or too high to orchestrate the abductions and murders at bar or to form a precise or specific intent. These murders were committed to collect debts, scare other "deadbeats" and eliminate a potential witness. **Parker, supra**, at 1471.
>
> (c) As ring leader and as the man who slit Ms. Sheppard's throat, Parker's role was not "minor". **Parker, supra**.
>
> (d) Mr. Parker's youth or his favors to his friends had little relevance to his narcotics operation or his wanton disregard for human life.

(e) Mr. Parker's point (e) is pure speculation, not fact.

(f) Mr. Parker's employee, Tommy Groover, was sentenced to death for his role in the murder of one of the other victims. Parker's sentence was not disproportionate to Groover's. Co-defendant Long was under Parker's domination since, once before, Parker had actually shot Long. **Parker**, supra, at 1472.

(2) Facts: Question III
(**Stromberg** Claim)

Mr. Parker did not raise a specific "**Stromberg**" issue at trial or on direct appeal. At trial, he challenged the "sufficiency of the evidence", not the concept of "dual prosecution" (for premeditated and felony murder) of first degree murder. (T 2148-2149, 2264, 2274-2275).

Mr. Parker did not argue "**Stromberg**" on appeal, but rather offered this novel argument for the very first time in a motion for rehearing, which was summarily denied, without opinion.

(3) Facts: Question IV
(Duress Instruction)

Florida does not recognize "duress" as a defense to murder, so no jury instruction on "duress" was given (especially in the absence of any evidence of duress). (T 2093-2096).

Mr. Parker now seeks certiorari review on what he perceives as a misinterpretation of state law by the federal and state courts.

(4) Facts: Question V
(**Geders** Issue)

Mr. Parker testified on his own behalf at trial. His cross-examination (by the State) was interrupted by a dinner break. (T 1855-1856). During this recess, Parker conferred with counsel. (T 1963-1966).

When cross-examination resumed, the prosecutor properly questioned Mr. Parker on the issue of whether he had been "coached" during the recess. (T 1963-1966). Mr. Parker, in a supplemental memorandum of law, conceded that **Geders v. United States**, 425 U.S. 80 (1976), controlled the issue. (R 1, 17, 13-14).

(5) Facts: Question VI
(Jurisdiction)

Mr. Parker's statement is accepted.

We would note, as this Honorable Court is probably aware by now, that the United States District Court subsequently ruled on Mr. Parker's three remaining issues and that they are now presently before the Eleventh Circuit.

REASONS FOR DENYING THE WRIT

QUESTION I

IT IS SUGGESTED THAT CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A DECISION OF THE CIRCUIT COURT WHICH FOLLOWS, AND APPLIES, A PRIOR DECISION OF THIS COURT

Mr. Parker's petition fails to address or satisfy the standards for obtaining certiorari review set forth in Rule 17.

The decision to abide by the express holding of **Spaziano v. Florida**, 468 U.S. 447 (1984), does not, for example, conflict with the decisions of any other circuit courts, with the Florida Supreme Court or with this Honorable Court. Nor does the opinion below decide an important issue of federal law which "has not been, but should be, settled by this Court." See Rule 17.

In **Spaziano**, this Honorable Court conducted a proper Eighth Amendment analysis of Florida's jury override procedures, but refused to engage in any resentencing of Mr. Spaziano, stating:

> The Florida Supreme Court reviewed petitioner's death sentence and concluded that the death penalty was properly imposed under state law. It is not our function to decide whether we agree with the majority of the advisory jury or with the trial judge and the Florida Supreme Court. See **Barclay v. Florida**. . .

Spaziano, supra, at 467.

Spaziano, of course, followed **Barclay v. Florida**, 463 U.S. 939, 957 (1983), in which this Court held:

> These varied assertions seem to suggest that the Florida Supreme Court failed to properly apply its own cases in upholding petitioner's death sentence. The obvious answer to this question, as indicated in the previous discussion, is that mere errors of state law are not the concern of this Court.

Barclay, in its turn, relied upon this Court's decision in **Gryger v. Burke**, 334 U.S. 728, 731 (1948):

> His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

Of course, in addressing the Eighth Amendment, this Honorable Court has already rejected the concept of federal resentencing on this basis. See **Wainwright v. Goode**, 464 U.S. 78, 84 (1983). The **Goode** court held:

> It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension. **Engle v. Isaac**, 457 U.S. 1141, 73 L.Ed.2d 1361, 102 S.Ct. 3474 (1982); **Smith v. Phillips**, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982). Section 2254 is explicit that a federal court is to entertain an application for a writ of habeas corpus "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." The Eleventh Circuit's ultimate conclusion was that the sentencing proceeding violated the Eighth Amendment, but it is critical to understand the reasoning it employed in reaching that result. It acknowledged that the federal constitution does not prohibit consideration of a defendant's future dangerousness. In fact, the court described the factor as "highly relevant to the purposes underlying capital sentencing." [citation] Nevertheless, future dangerousness was a nonstatutory aggravating circumstance that could not be relied upon to impose the death sentence without violating Florida law. Because the Court of Appeals was of the view that the sentencing judge had relied upon future dangerousness, the death sentence violated state law and was deemed arbitrary punishment under the Eighth Amendment.
>
> The difficulty with all of this is that the Florida Supreme Court had concluded that the trial judge had not improperly relied upon future dangerousness in imposing the death penalty. If the interpretation of the trial judge's remarks is deemed a legal issue, it is surely an issue of state law that the Court of Appeals should have accepted . . . If the Florida Supreme Court's conclusion that the death sentence was consistent with state law is accepted, the constitutional violation found by the Court of Appeals dissolves.

Mr. Parker strenuously argues for federal resentencing, despite the controlling law, on several grounds.

First, Parker complains that over the past seventeen years Florida capital sentencing decisions have evolved rather than remained fixed or inflexible. Parker's demand for legal rigidity does not compel certiorari review or even comport with common sense. Common law evolves. Capital cases cannot be held to a different standard.

Second, Parker disingenuously complains that "only" he received a death sentence and that he was only a bystander. Only Parker was sentenced to death for the Sheppard murder, but Mr. Groover, Parker's henchman, also received a death sentence for his actions that night. Parker, the ringleader, ordered and orchestrated all of the killings and, in the case of Ms. Sheppard, personally slit her throat. He was not a bystander and he was not singled out for a death sentence.

Given Mr. Parker's avoidance of Rule 17, the controlling law and the facts, it is obvious that his only hope of obtaining relief is by a plaintive request for resentencing on the basis of his perception of the facts. Certiorari was not created for that purpose and therefore relief should be denied.

QUESTION II

IT IS SUGGESTED THAT CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A FINDING OF PROCEDURAL DEFAULT

No federal or state court has yet agreed with Mr. Parker that he raised his so-called "Stromberg" claim at trial or on appeal.

Mr. Parker's general challenge to the sufficiency of the evidence at trial did not preserve this issue for appellate review. Even if it could have preserved the issue, Mr. Parker never raised the issue on appeal in any way, shape or form.

After Parker lost his appeal, Parker raised the issue in a motion for rehearing. The Respondent is aware of no federal or state jurisdiction which approves of this tactic. Parker's request for rehearing, summarily denied without opinion, was not a merits ruling and cannot be represented as one in all candor.

There is no basis in law or fact for certiorari review.

QUESTION III

IT IS SUGGESTED THAT CERTIORARI SHOULD NOT BE GRANTED TO REVIEW A STATE COURT DECISION APPLYING STATE LAW GOVERNING JURY INSTRUCTIONS

Parker, as the leader of this drug dealing organization, orchestrated the murders at bar and, the record shows, was even

armed at times when his employees - Groover and Long - were not. Parker now says that his hirelings "coerced him" into ordering them to kill people to obtain money for Parker. This illogical theory not only defies common sense, it is contrary to Florida law.

Duress is not and never has been a defense to murder in the first degree in our state.

Parker alleged that Hall v. State, 187 So. 392 (Fla. 1939), recognized "duress" as a defense. It does not. Hall was a perjury prosecution, not a murder case, involving a non-party witness. Duress can be a defense to perjury, but not murder. Cawthon v. State, 382 So.2d 796 (Fla. 1st DCA 1980); Wright v. State, 402 So.2d 493 (Fla. 3rd DCA 1981).

Parker also tried to tell the lower courts that Chestnut v. State, 505 So.2d 1352 (Fla. 1st DCA 1987), recognized "duress" when in fact his "recognition" came from a dissenting opinion.

Parker concluded by misrepresenting that two other cases (a burglary case and a kidnapping case) upheld "duress" as a defense to murder.

In this Court, Mr. Parker has abandoned his Florida precedents and has alleged that Florida should have given him a jury instruction on "duress" simply because he wanted one, whether it was in accordance with the law or not. He then vainly tried to equate "duress" with "self-defense" and "cause of death" defenses. (Petitioner, page 20).

We submit that certiorari should not be granted simply to indulge arguments on Mr. Parker's theories of how state law ought to be changed. Again, Rule 17 does not provide for this kind of review.

Florida cannot be ordered to legitimize murder by "duress" (i.e., Parker's need to collect drug money and build a reputation), nor can it be compelled to give a "duress" instruction that would be totally devoid of evidentiary support.

Mr. Parker's request is not only untenable, it is nonsense.

QUESTION IV

IT IS SUGGESTED THAT CERTIORARI NEED NOT BE GRANTED TO RENDER AN ADVISORY OPINION IN A SPECIFIC CASE

There is no disputing the fact that **Geders v. United States**, 425 U.S. 80 (1976), controls this case. Even Mr. Parker has conceded the point.

Mr. Parker, however, requests an advisory opinion setting out "rules" for any **Geders**-authorized cross-examination in the state courts.

Again, certiorari is not the appropriate forum. It is not a vehicle for obtaining advisory opinions or for the crafting rules of evidence that are purely mechanical in nature.

Absent any constitutional issue or other basis for review, certiorari should be denied.

QUESTION V

IT IS SUGGESTED THAT CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE PETITIONER'S JURISDICTIONAL QUESTION

The United States District Court granted Parker a writ of habeas corpus. Florida could not execute him.

Parker, oddly, now alleges that this order is somehow "not a final order" and that the District Court insulated its writ from all appellate review by declining to rule on three of his fifteen claims. Mr. Parker does not explain whether or not the State could have executed him or how the State could even have obtained review without the consent of the District Court.

Mr. Parker's peculiar hypothesis was only raised by Mr. Parker after he lost this appeal and his own cross-appeal. Nevertheless, the Circuit Court denied the claim and Mr. Parker can point to no conflict of decisional law or other reason to open this issue to review.

Incidentally, on remand the District Court decided the remaining three issues against Mr. Parker. Thus, the issue is really moot, unless Mr. Parker wants the Circuit Court to reopen the appeal and republish its opinion in a massive waste or judicial time and labor.

CONCLUSION

Certiorari should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Robert J. Link, Esq., HOWELL, LILES & MILTON, 233 East Bay Street, Jacksonville, Florida 32202, this 4th day of December, 1989.

MARK C. MENSER
Assistant Attorney General

ORIGINAL

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

Case No. 89-5961

ROBERT LACY PARKER

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida

Respondents.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is the application of Florida's jury override standard in an individual case subject to an Eighth Amendment review, and, if so, what standard of review is applicable?

II. Is a valid constitutional claim procedurally barred when a Defendant fails to raise it in state collateral proceedings, despite having raised it in the trial court and on direct appeal?

III. Can a harmless error analysis be applied to an erroneous jury instruction on a theory of defense which applies to one of the two prosecution theories of criminal liability?

IV. May a prosecutor always cross-examine a defendant about the fact that he consulted with his lawyer during a recess in the trial, or should the prosecutor first be required to proffer a good faith basis for such an interrogation?

V. In a habeas corpus proceeding presenting multiple claims for relief, does an appellate court have jurisdiction to review an order of the district court that does not dispose of all of petitioner's claims?

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

Case No. 89-5961

ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER, et al.,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

I. Reply to Respondents' Arguments as to Question I (Jury Override Issue)

The Respondent cites as "facts" certain statements taken from the Eleventh Circuit's opinion, which in turn were taken from the trial court judge's sentencing order. It should be pointed out that these factual conclusions were sharply disputed at trial, and that neither the Florida Supreme Court nor the District Court accepted Judge Oliff's sentencing order as the "facts of the case." Indeed, the factual dispute as to Mr. Parker's culpability and as to the extent of his participation in these crimes constitutes a mitigating circumstance that, in other Florida cases, has required a life recommendation to be followed. See, Malloy v. State, 382 So.2d 1190 (Fla.1979); Smith v. State, 403 So.2d 933 (Fla.1981); Spivey v. State, 529 So.2d 1088 (Fla.1988). Considered in this light, the factual dispute points out the validity of Petitioner's claim.

The Respondent appears to argue that the application of the Tedder jury override standard is a matter of state law not subject to review, citing Wainwright v. Goode, 464 U.S.78 (1983), Barclay v. Florida, 463 U.S.939 (1983), and Gryger v. Burke, 334 U.S.728 (1948). However, both the District Court and the Eleventh Circuit Court of Appeals below found that the application of the Tedder standard was subject to federal review, as this Court indicated in Spaziano v. Florida, 468 U.S.447 (1984). The State is asking this Court to deny certiorari because it is satisfied with the result, but not the reasoning, of the holding in the lower court. The Eleventh Circuit's holding that the application of the Tedder standard in an individual case is subject to Eighth Amendment review was and is in direct contradiction to the State's position, both in the Eleventh Circuit and before this Court.

It is noteworthy that the Respondent completely fails to explain why the analysis performed by the Eleventh Circuit in this case does not conflict with the analysis of this Court in Godfrey v. Georgia, 446 U.S.420 (1980), and Maynard v. Cartwright, 108 S.Ct. 1853 (1988). The Godfrey/Maynard Eighth Amendment analysis requires a federal court to examine the application of a state's death penalty scheme in the case before it to determine whether there is any principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not. Godfrey, at 433. The Respondent cannot explain why the Eleventh Circuit made no such Eighth Amendment analysis, and does not even attempt to do so. The decision in this case also conflicts with the Ninth Circuit's decision in Jeffers v. Ricketts, 832 F.2d 476

(9th Cir.1987), where that Court used the Godfrey-Maynard standard of review to find that the Arizona death penalty scheme was unconstitutionally applied to Jeffers. While it is clear that the Eleventh Circuit did not apply the Godfrey-Maynard standard of review, it is unclear as to what standard of review in fact was applied.

The Eleventh Circuit does not appear to be likely to clarify this problem in the near future. In the recent decision of Lusk v. Dugger, ___ F.2d _____ Case No. 88-4042 (11th Cir. November 22, 1989), attached as Exhibit 1, the Eleventh Circuit again stated that the application of the Tedder jury override standard was subject to federal review in habeas corpus. However, again the court failed to apply any discernable standard in reviewing the application of the jury override. As in this case, the Eleventh Circuit in Lusk reversed the district court's decision that a jury override was applied in an unconstitutional fashion. As in this case, the court simply stated that the override did not appear to be "arbitrary or discriminatory" and that therefore, it was constitutionally applied. As in this case, the appellate court made no effort to compare the case at issue, in which the jury override was sustained, from the many cases in which a jury override was not. As in this case, there is no analysis performed by the appellate court, and there is no discernable standard of review.

In Lusk, the Eleventh Circuit noted that in this case, Parker v. Dugger, 876 F.2d 1470 (11th Cir.1989), there were mitigating circumstances present that would have been sufficient to support

a life recommendation in other cases. Lusk, id., at p.21, n.8. This remarkable concession by the Eleventh Circuit points out the very arbitrariness that is the basis of this claim. Equally disturbing is the failure of the Eleventh Circuit, in either this case or in Lusk, to address the significance of the admission by the Florida Supreme Court that its application of the Tedder standard was inconsistent at the time it decided Mr. Parker's appeal (1984-1985). Cochran v. State, 547 So.2d 928, 933 (Fla.1989). In Spaziano v. Florida, this Court upheld a jury override, because "(W)e see nothing that suggests that the application of the jury override procedure has resulted in arbitrary of discriminatory application of the death penalty, either in general or in this particular case." Spaziano, at 465. It is apparent from Cochran, however, that the application of the jury override procedure by the Florida Supreme Court was arbitrary when Mr. Parker's direct appeal was decided. The Eleventh Circuit has twice had the opportunity to address this issue and has twice resolved it with confusing opinions indicating no standard of review. It should be obvious that this is an issue that will continue to appear until it is resolved by this Court, as Mr. Parker suggests.

The Respondent does not argue that the decision in this case does not conflict with Godfrey or Maynard or Jeffers. The Respondent simply ignores these conflicting decisions and states that the jury override is not subject to federal review. This is contrary to the holding of the Eleventh Circuit in this case and in Lusk. Thus, the Respondent has not only failed to explain why

the decision of the Eleventh Circuit in this case does not conflict with Godfrey, Maynard, and Jeffers, it has failed to even address the issue. If the Respondent's position is that the Eleventh Circuit made the right decision for the wrong reasons, that is hardly a valid reason for this Court to deny review. The standard of review applied by the Eleventh Circuit in reviewing the death sentence imposed in this case is in direct conflict with decisions of this Court and of other courts of appeals. As such, it comes squarely within the ambit of Rule 10.1(a) and (c), Rules of the Supreme Court.

II. Reply as to Question II (Procedural Default Issue)

The Respondent erroneously states that no federal or state court has yet agreed with Mr. Parker that the due process/Stromberg claim was raised at trial or on appeal. The fact of the matter is that the district court noted that the issue was raised at the trial level so clearly that a reviewing court could not have failed to see it (A-3). The Respondent in its brief acknowledges that Petitioner raised this claim in his Motion for Rehearing on the direct appeal. The Eleventh Circuit's opinion finding that the Stromberg issue was not raised at trial or on rehearing is thus at odds with both the district court and with the State of Florida itself.

The Respondent in its brief admits that the Stromberg issue was raised in the Motion for Rehearing and that the Motion was denied without opinion. Therefore, even by the Respondent's version of the facts, there was no "plain statement" from the Florida Supreme Court that the Stromberg/due process issue was

procedurally barred. When the issue was brought to the Florida Supreme Court's attention, the court denied the issue without opinion. Even accepting the State's analysis, then, it would appear that the decision in Parker v. Dugger, finding procedural default, would be in conflict with this Court's decision in Harris v. Reed, 109 S.Ct. 1038 (1989).

It is noteworthy that the Respondent fails to attempt to justify the alternative holding by the Eleventh Circuit that finds procedural bar because Mr. Parker did not raise the Stromberg issue again in state collateral proceedings. The rationale of the Eleventh Circuit appears to be that because the Petitioner failed to raise the due process/Stromberg claim before the Florida Supreme Court in collateral review and because the Florida Supreme Court's decision in collateral review was the last state court rendering judgment in this case, then Petitioner is barred from raising this issue in federal court, even if it was raised during the direct appeal. Parker v. Dugger, id., at 1477, n.10. That the State does not attempt to support this obviously erroneously interpretation of Harris is no basis for allowing this opinion to stand.

III. Reply as to Question III (Jury Instruction Issue)

The Respondent must misrepresent the evidence in order to justify the State's position in this issue. Despite the Respondent's assertions, the uncontradicted evidence at trial disclosed that Parker was unarmed at the time of all three homicides in this case. Despite Respondent's assertion that the record was devoid of evidentiary support for a duress instruction, the record discloses that the trial court gave a "duress is not a

defense" instruction to the jury at the State's request because both the State and the trial court judge felt that there was substantial evidence of duress in the record, and that therefore such an instruction had to be given. (T.2119-22) This is only logical. If there was no evidence of duress, why did the State feel compelled to ask the trial court to instruct the jury, and why did the trial court feel compelled to instruct the jury over defense objection, that duress was not a defense to homicide at all? The Respondent makes no attempt to justify the giving of this instruction, and cannot do so.

It appears that the substance of the State's argument here is that federal courts should not review a state court decision erroneously applying state law governing jury instructions. However, as the Eleventh Circuit noted, other federal appellate courts have held that a state trial judge can violate a defendants right to due process by committing an error of state law in denying a requested jury instruction or in giving an erroneous instruction. Parker v. Dugger, at 1478. See also, U.S. Ex rel Means v. Solem, 646 F.2d 322 (8th Cir.1980). It is apparently Respondent's contention that the due process clause provides no impediment to a state trial judge who wishes to instruct a jury that a defendant's legally viable defense is not available to him in a specific case.

IV. Reply as to Question IV (Cross Examination Issue)

Certiorari is appropriate when a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Rule 10.1(c),

Rules of the Supreme Court. It is submitted that the scope of permissible cross examination of a defendant about his conferences with his lawyer is just such an issue.

Just last term, this Court noted the increasing frequency with which the "consultation during a recess" issue arises. Perry v. Leeke, 109 S.Ct.594, 598 n.2 (1989). This Court has noted, in both Geders v. U.S., 425 U.S. 80 (1976), and Perry v. Leeke, that cross-examination is the most effective tool for the prevention of improper coaching by defense counsel, should it occur. This Court, however, has not placed any limitation or restrictions on the permissible scope of cross-examination of a defendant about consultation with his lawyer. Is the fact of consultation with counsel during a recess prima facie evidence of coaching? If not, how can the fact of consultation, standing alone, be used to impach a defendant's credibility, as was done here? Does the use of the mere fact of consultation to impeach credibility violate due process or is such interrogation a proper prosecutorial resonse to consultation with counsel? This is an important issue that can only be settled by this Court.

V. Reply Regarding Question V (Jurisdictional Issue)

Mr. Parker chooses to make no additional argument here. However, Petitioner should point out that his appeal from the District Court on the remaining issues in his habeas petition was recently denied by the Eleventh Circuit. This means that this Court may well be receiving a second Petition for Writ of Certiorari based upon the same habeas corpus petition within several weeks.

WHEREFORE, Petitioner Robert Parker prays this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

SAALFIELD, CATLIN, COULSON,
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By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mark Menser, Esquire, Assistant Attorney General, The Capitol, Tallahassee, FL 32301 by Mail, this ____ day of January, 1990.

_____
Attorney

Exhibit A

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-4042

BOBBY EARL LUSK,

Petitioner-Appellee,
Cross-Appellant,

versus

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondent-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(November 22, 1989)

Before EDMONDSON and COX, Circuit Judges, and RONEY, Senior Circuit Judge.

COX, Circuit Judge:

Bobby Earl Lusk was convicted in Florida of first-degree murder and sentenced to death. He filed a 28 U.S.C. § 2254 petition seeking habeas corpus relief. The district court denied relief as to the conviction, but granted relief as to the sentence. Lusk appeals the denial of relief as to the conviction, and the state cross-appeals the grant of relief as to the sentence. We affirm the denial of relief as

to the conviction, reverse the grant of relief as to the sentence, and remand to enable the district court to consider the claims it has not yet addressed.

I. Procedural Background

Florida State Prison inmate Bobby Earl Lusk fatally stabbed fellow inmate Michael Hall. The Supreme Court of Florida has accurately summarized the facts as follows:

> At the Thanksgiving Day noon meal in the Florida State Prison cafeteria on November 23, 1978, Bobby Earl Lusk fatally stabbed inmate Michael Hall. Lusk was serving three consecutive fifty terms for two convictions of armed robbery with a pistol and a simultaneous conviction of first-degree murder. The victim, Hall, was serving a 30-year sentence for the second-degree stabbing murder of an inmate at Sumter Correctional Institution. Lusk initially made a statement to prison officials that Hall and two other inmates had robbed him in his cell on the morning of the murder, stabbed his mattress several times and threatened him if he reported the incident. He then said he would not take it anymore and resolved to kill one of the men. According to Lusk, he took his homemade knife to the dining hall at lunchtime and stabbed Hall in the back two or three times. (The body had three stab wounds in the back.) He concluded the statement by saying that Hall had been sitting when he stabbed him and Hall had thrown a tray at him after the stabbing. Lusk moved to suppress the confession as being involuntary but this was denied. . . . At trial, Lusk testified and offered self-defense as an explanation for the crime, stating that Hall threatened to "take him out" and that Hall attacked him first with a knife of his own.

Lusk v. State, 446 So.2d 1038, 1040 (Fla. 1984) ("Lusk I").

Lusk was indicted for first-degree murder. Attorney Mack Futch was appointed to represent him, and the case went to trial in December, 1979.

Lusk testified at the trial and offered self-defense as his explanation for the slaying. The jury found Lusk guilty of first-degree murder as charged. Two days later the trial court reconvened the jury for an advisory sentencing hearing (the "penalty phase"). Lusk also testified at this hearing, and other witnesses were called on his behalf. The state's evidence at this hearing consisted of Lusk's prior first-degree murder conviction and two robbery convictions; a narrative description of these crimes was read to the jury.

In closing arguments to the jury at the penalty phase, the state argued the presence of four statutory aggravating factors:

> (a) The capital felony was committed by a person under sentence of imprisonment.
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) The defendant knowingly created a great risk of death to many persons.
>
> . . .
>
> (h) The capital felony was especially heinous, atrocious, or cruel.

Fla. Stat. Ann. § 921.141 (1985).

In his closing argument, attorney Futch did not review the evidence presented at the penalty phase, but instead pleaded for mercy. The jury returned a recommendation of life imprisonment.

The second phase of the sentencing proceeding (the "sentencing phase") was held before Judge Fagan, the trial

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judge, in February, 1980. Judge Fagan acknowledged that the jury had responded to counsel's eloquent and persuasive argument for mercy. He stated that "[n]o argument was made, nor could any have been justifiably made, in favor of mitigating circumstances outweighing aggravating circumstances." Appendix to Petition for a Writ of Habeas Corpus (hereafter "Appendix") Vol. 1, p. 588. Judge Fagan found no mitigating factors to balance against the four aggravating factors presented by the state. He noted that "[t]here were no mitigating circumstances, either as statutorily prescribed or as should otherwise be considered against the aggravating circumstances prescribed by the statute." Id. at 588-89. He thus accepted all of the aggravating factors, overrode the jury's recommendation, and sentenced Lusk to death.

Lusk appealed to the Florida Supreme Court, which unanimously affirmed his conviction and affirmed the death sentence with two justices dissenting. Lusk v. State, 446 So.2d 1038 (1984)("Lusk I"), cert. denied, 469 U.S. 873 (1984). The state supreme court struck one aggravating factor -- that Lusk knowingly created a great risk of death to many persons -- as not supported by the record. The court concluded, however, that the remaining three aggravating factors would sustain the trial court's override of the jury's recommendation. The Florida Supreme Court applied its

Tedder[1] rule and found no reason to reverse the judge's sentence:

> After having reviewed the record and in light of the totality of the circumstances, we hold that the jury override in this case is proper since the facts suggesting the death sentence are so clear and convincing that no reasonable person could differ. . . . Additionally, we conclude that the jury's recommendation of life was not based on any valid mitigating factor discernible from the record and therefore it was proper for the trial judge to decline to follow their recommendation.

446 So.2d at 1043.

Lusk then petitioned for collateral relief pursuant to Fla. R. Crim. P. 3.850. His claims included a claim that he received ineffective assistance of counsel at the guilt, penalty and sentencing phases of his trial. An evidentiary hearing was held in the state court before Judge Fagan at which Lusk offered evidence of his victim's reputation for violence, contending that he was prejudiced by the failure of his counsel to introduce this evidence at the guilt and penalty phases of trial. Lusk also presented evidence of his own troubled background, alleging prejudice in his counsel's

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[1] Tedder v. State, 322 So.2d 908 (Fla. 1975), established Florida's standard of reviewing a judge's decision to override an advisory jury's recommendation of life. Therein the court stated:

> A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Id. at 910.

failure to introduce such evidence at the penalty and sentencing phases. Lusk's petition for relief was denied.

The Florida Supreme Court affirmed denial of the 3.850 petition. Lusk v. State, 498 So.2d 902 (1986)("Lusk II"), cert. denied, 481 U.S. 1024 (1987). That court first addressed Lusk's contention that counsel rendered ineffective assistance at the guilt phase and concluded that Lusk had not shown counsel's performance to be deficient. The court also rejected Lusk's argument that counsel was ineffective at the penalty phase for failing to introduce more evidence in mitigation.

Lusk thereafter petitioned the Florida Supreme Court for a writ of habeas corpus, alleging ineffective assistance of counsel on direct appeal. That petition was summarily denied. Lusk v. Dugger, No. 70,841 (Fla., Oct. 28, 1987).

In January 1988, Lusk filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. His petition asserts a claim of ineffective assistance of counsel at all stages of trial and on direct appeal, which challenges both his conviction and his sentence. He asserts other claims which challenge only his sentence. The district court denied relief as to the conviction, but granted relief as to the sentence. The court vacated the sentence of death and allowed the state 120 days within which to resentence Lusk to a sentence other than death. Lusk appealed this

denial of relief as to his conviction; the state cross-appealed the order vacating the death sentence.[2]

II. The Ineffective Assistance of Counsel Claims

Initially, we address our standard of review of the district court's conclusion that Lusk was not denied effective assistance of counsel at the guilt, penalty and sentencing phases of his trial. The claim of ineffective assistance of counsel presents a mixed question of law and fact and, as such, is subject to our plenary review. Strickland v. Washington, 466 U.S. 668 (1984); Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987), reh'g en banc denied, 835 F.2d 291, cert. denied, 108 S. Ct. 1099 (1988). The findings of historical fact made by the state courts on this issue are entitled to a presumption of correctness. 28 U.S.C. § 2254(d). The conclusions regarding effective assistance of counsel, however, whether made by the Florida state courts or the district court and whether stated as a "finding" or not, are matters of law and thus are not presumed correct. We therefore independently consider whether Lusk was deprived of his right to effective assistance of counsel.

The familiar standard enunciated in Strickland v. Washington, 466 U.S. 668 (1984), governs claims that a

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[2] Lusk does not argue in his appellate brief that he received ineffective assistance of counsel on direct appeal and therefore that claim is considered abandoned. Ballard v. Johnson, 821 F.2d 568 n.1 (11th Cir. 1987).

defendant was denied the effective assistance of counsel guaranteed by the Sixth Amendment. First, the court must determine whether the acts or omissions of counsel identified by the defendant were "outside the wide range of professionally competent assistance." Id. at 690. Second, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Each of the two prongs of the test -- performance and prejudice -- are mixed questions of law and fact. In deciding the ultimate question of whether the petitioner was denied effective assistance at some phase of his trial, each component must be satisfied. Thus, regardless of which prong is addressed first, it is a threshold to the next. Id. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order [as the Strickland Court] or even to address both components of the inquiry if the defendant makes an insufficient showing on one."). We conclude that Lusk fails to demonstrate that he was prejudiced by his counsel's performance at any stage of trial and sentencing. We thus need not reach the performance prong of Strickland in our analysis.

A. The Guilt Phase

Lusk asserts prejudicial error on the part of his counsel for failure to introduce "critical evidence" to support his defense of self-defense. This consists of evidence of his victim's character and reputation as well as the facts underlying Hall's prison murder conviction and disciplinary record. Lusk presents these factors as justification for the stabbing, stating that there is "of course, little more powerful evidence to support a claim of self-defense." Brief for Appellant, 45-47.

The jury was well aware that this case arose from a prisoner-on-prisoner homicide in a Florida state penitentiary. In view of the evidence regarding Hall's alleged robbery of Lusk the morning of the murder, his threats against Lusk, as well as his nickname of "Yard Dog," explained at trial as meaning that Hall was a "big wheel" in the prison, Hall's violent nature could not have been lost on the jury. We agree with the Florida Supreme Court's finding that "the jury was made aware of Hall's reputation for violence." Lusk I, 498 So.2d at 905. The trial judge accurately charged the jury on self-defense under Florida law. A critical element of that defense is that to justify the use of deadly force, the force opposed must be imminent. Although incarceration in a state penitentiary might be a circumstance to be considered by a factfinder in assessing a claim of self-defense, the rule does not operate differently

because the participants are behind bars. One prisoner may not kill another inmate in a preemptive strike and then excuse the act as done in self-defense. The record amply supports the jury's rejection of self-defense. Considering that Lusk's attack on Hall took place four hours after the alleged provocation and that Lusk stabbed Hall in the back as his victim ate lunch, we find the element of imminence lacking, even in the context of a state prison. Consequently, we conclude that Lusk has not carried his burden of proving to a reasonable probability that he was prejudiced by counsel's failure to put on evidence of Hall's reputation and prior murder conviction at the guilt phase.

B. The Penalty and Sentencing Phases

Lusk also contends that his attorney's failure to present various nonstatutory mitigating evidence at the penalty and sentencing phases of the trial constitutes ineffective assistance.[3] He argues that this mitigating evidence would have supplied a reasonable basis for the jury's recommendation of life and would have precluded an override by the trial judge under the Tedder standard. Judge Fagan, who had been the trial judge, considered the evidence at the 3.850 hearing and concluded that Lusk was not prejudiced by his attorney's failure to present these matters

[3] We refer to the hearing before the advisory jury as the "penalty phase" and to the subsequent hearing before the judge as the "sentencing phase."

at the penalty and sentencing hearings, as the evidence added nothing new and was merely cumulative of that which was considered previously. The Florida Supreme Court agreed that the evidence was cumulative, and added that it "would not have affected the ultimate sentence imposed in view of the aggravating factors affirmed by this court [on direct appeal]." Lusk II, 498 So.2d at 906.

The district court found that counsel's failure to obtain and offer evidence at the penalty and sentencing phases which established these nonstatutory mitigating circumstances constituted deficient performance on his part, but concluded that petitioner had not established that he was prejudiced. We agree that Lusk has not demonstrated prejudice and therefore need not address the performance prong of the Strickland analysis.

As noted, Lusk asserts that his lawyer should have presented evidence of nonstatutory mitigating circumstances so as to foreclose an override.[4] This evidence was

[4] This contention is inextricably linked to Lusk's interpretation of Tedder and its progeny. Lusk contends that if there is any basis to support a jury recommendation of life, then the trial judge must abandon his duty to balance aggravating factors against mitigating factors in determining sentence and accept that recommendation.

It is now clear that the Florida courts do not so interpret Tedder. The Florida Supreme Court recently held in Pentecost v. State, 545 So.2d 861 (1989) that such an understanding of the jury override rule was incorrect:

> In Ferry v. State, we stated: "When there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation

presented at the 3.850 hearing and consists of evidence relative to (1) Lusk's childhood and family background; (2) Hall's prison record, to show the basis for Lusk's fear of Hall; and (3) Lusk's favorable adjustment to prison life.

The evidence relative to Lusk's childhood and family background consists of records from Lusk's stay at the

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> an override may not be warranted." We recede from any implication in Fead v. State, that an override is never warranted when valid mitigating factors exist.

Id. at 863, n.3 (citations omitted).

In Parker v. Dugger, 876 F.2d 1470 (11th Cir. 1989), this court reversed the district court's grant of relief as to defendant's death sentence, which had been imposed contrary to the trial jury's recommendation of life imprisonment. At his penalty hearing, the defendant offered both statutory and nonstatutory mitigating evidence, including the testimony of six witnesses who testified to redeeming qualities in his character. The sentencing judge rejected the mitigating evidence, found six statutory aggravating circumstances and sentenced the defendant to death. The defendant's conviction and death sentence and subsequent denial of relief in state collateral proceedings were affirmed by the state supreme court. In federal habeas review, however, the district court vacated the death sentence because it concluded that the Florida courts had abdicated their review under the Tedder standard. This court disagreed and reversed, noting:

> Our court, however, has rejected the theory that a trial judge's failure to make specific written findings concerning nonstatutory mitigating circumstances raises the inference that he did not consider such evidence in reaching the decision to impose the death penalty. . . . [N]o inference can be drawn from the trial judge's silence that he did not find nonstatutory mitigating circumstances to be present. Under the facts of this case the only reasonable conclusion is that the trial judge found at least some mitigating factors to be present, but also found that they were outweighed by the aggravating factors also present.

Id. at 1475 (citation omitted).

Kentucky Children's Home in 1962 and Western State Hospital in 1968 for psychiatric evaluation as a child and adolescent. (Appendix Vol. 3, p. 1136-1192; 1252-1261). Lusk contends that this evidence chronicles a childhood of "neglect and abuse, periods of running away from home starting as early as age ten, and troubled relationships with his two fathers, his natural father and his stepfather, who used him as a pawn in their feud over his mother." (Initial Brief of Appellant, page 41).

At the sentencing hearing, Lusk testified that he had been committed to these institutions for observation, but had never been adjudicated incompetent. (Appendix Vol. 1, p. 537-39). The records from Kentucky welfare authorities reveal conflict and friction which existed between Lusk's mother and stepfather (the Lusks) on the one hand and his natural father and wife (the Walkers) on the other. See e.g., Appendix Vol. 3, p. 1149, 1167. In January 1962, Bobby Lusk was declared a needy, neglected and dependant child. Id. at 1138. In March 1962, he was committed to the Department of Child Welfare as a delinquent child who was truant, destructive at school and defiant of all authority. Id. Evaluations described him as emotionally disturbed and needing psychiatric evaluation and treatment. Id. at 1141. Later evaluations, after his placement in the Kentucky Children's Home and before his release to the Lusk family (which had then moved across town from the Walkers),

described Lusk as considerably improved and making noticeable progress. Id. at 1154, 1157, 1163. The 1968 records from Western State Hospital recount Lusk's problems with glue sniffing, id. at 1254, and also mention that he had broken into a pawn shop and on a few occasions had pointed guns at his parents or other people. Id. at 1258, 1259.

We agree with the Florida Supreme Court that even if this evidence had been introduced to bolster Lusk's testimony as to his background, the death sentence would not be affected due to the presence of significant aggravating factors. Although one can speculate in hindsight that it may have been desirable to present this evidence to the jury, it is also possible that the remoteness in time of these episodes to Lusk's murder of Hall in 1978 would have been as irrelevant to the advisory jury as it was to the sentencing judge. Further, such evidence might, in fact, be aggravating rather than mitigating. Lusk's own expert witness at the 3.850 evidentiary hearing conceded on cross-examination that the advisory jury could have found this evidence aggravating. Appendix Vol. 2, p. 1065-68. In any event, in view of the totality of the evidence, we conclude that Lusk has not shown a reasonable probability that the result would be different if this evidence relative to his childhood had been introduced.

Lusk argues that previous decisions by this court in which the attorneys' failures to investigate and introduce

background evidence in the penalty phase of capital trials were held to be prejudicial mandate the same holding in his case, citing Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); and Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 468 U.S. 1206, vacated and remanded on other grounds, 468 U.S. 1212 (1984), panel opinion reinstated, 739 F.2d 531, cert. denied, 469 U.S. 1208 (1985). We find those cases factually distinguishable and not controlling here.

Turning to the evidence of Hall's prison record, we note that the penalty hearing was conducted before the same petit jury that determined guilt. At the outset of the penalty hearing, the trial judge instructed the jury to consider the penalty phase evidence together with the guilt phase evidence in reaching a recommendation. Thus, the jury was apprised of Hall's violent nature and of the fact, through Lusk's own testimony at the penalty phase, that Hall had murdered another inmate. In sentencing Lusk, the trial judge stated that he had not limited consideration of mitigating factors to those listed in the statute, but that in view of several undisputed aggravating factors, there were "insufficient mitigating circumstances to outweigh the aggravating circumstances." Appendix Vol. 1, p. 594. Because the sentencing judge was aware of the fact that Hall had

previously committed a murder while in prison, we conclude that Lusk was not prejudiced by the failure to have Hall's prison records introduced.

The evidence relative to Lusk's favorable adjustment to prison life does not qualify as a statutory mitigating circumstance, is not capable of justifying his crime, and would not offset the clearly established statutory aggravating circumstances which led Judge Fagan to override the jury recommendation. Although such evidence would not have been irrelevant, see Skipper v. South Carolina, 476 U.S. 1 (1986), on the facts of this case -- with particular focus on the fact that he committed this crime while in prison-- Lusk fails to show prejudice.

Lusk's claims of ineffective assistance of counsel include a claim that his counsel failed to review the presentence report with him prior to the sentencing hearing, and that this error on the part of his counsel was prejudicial because there were factual inaccuracies in the presentence report which impacted the sentence imposed. The district court did not discuss this contention in its opinion. Since the Strickland analysis requires an evaluation of counsel's overall performance at sentencing, however, and a determination of whether Lusk was prejudiced thereby, we deem it appropriate to address this claim at this time. There is no apparent reason not to address it. A full evidentiary hearing was held in the state post-conviction

proceedings, and no evidentiary hearing was either sought or held in the district court.

Lusk alleges that the presentence report is inaccurate in three respects. We will consider each alleged inaccuracy in turn.

Lusk contends that his stay at the Kentucky Children's Home in 1962 resulted from an adjudication that he was a neglected child, and that it was not due to a "prior arrest and conviction." The relevant portion of the presentence report reads as follows:

> II. PRIOR ARRESTS & CONVICTIONS
>
> Juvenile Record: (Taken from Classification Summary) "The subject denied having a juvenile record, however, other information indicates he was at the Kentucky Children's Home as well as the State Reformatory in Kentucky on several occasions. Those include 3 times for truancy once for B&E and one time for attempted murder. He was declared incorrigible at the age of [illegible] and sentenced to the State Prison."

Appendix Vol. 1, p. 576-a.

This report suggests -- without explicitly saying so -- that Lusk was at the Kentucky Children's Home or the state reformatory because of some criminal conduct. The records tendered by Lusk in support of his claim establish that he was initially afforded custodial housing because he had been declared "needy, neglected and dependent." The same record establishes, however, that he was indeed committed to the Department of Child Welfare by the Fulton County Juvenile Court on March 5, 1962, following a hearing on March 2, 1962. (Lusk was 11 years old at the time). The reception center

staffing report lists the reason for commitment as follows: "Present Offense: Truancy, destructive at school, rejects all authority." Appendix Vol. 3, p. 1138. The classification summary record which might explain the notations for attempted murder and B & E is not in the record.

Next, Lusk contends that he was an illegitimate child of an affair between his mother and a neighbor -- not born of the union between his mother and her husband as stated in the report. Lusk does not explain how this may have influenced the judge's decision relative to an appropriate sentence.

Finally, Lusk contends that the presentence report failed to refer to his "excellent adjustment and institutional record at F.S.P. prior to being preyed upon by Hall." What the report said about his institutional adjustment was that "he has not built a bad disciplinary record while a prisoner in the State of Florida. . . ." Appendix Vol. 1, p. 579. We conclude that these alleged inaccuracies are relatively insignificant, and fall far short of demonstrating a reasonable probability that a different sentence would have been imposed had they been brought to the attention of the sentencing judge.

The prejudice prong of the Strickland test, therefore, is not satisfied with respect to either the penalty or sentencing phases of Lusk's trial.

III. The Jury Override Issues

The ground upon which the district court granted Lusk relief was its conclusion that the Florida trial and appellate courts had misapplied the jury override standard in light of the constitutional obligation of the sentencer to listen to mitigating evidence. The court reasoned that the failure to consider nonstatutory mitigating evidence existant in the record -- evidence which it found adequate to support the jury's recommendation -- produced an arbitrary and irrational result in violation of the Eighth Amendment, thus mandating that the court vacate the death sentence.

The district court's premise in arriving at this conclusion is that the Florida courts' application of their jury override standard was tainted by some Lockett[5]-Eddings[6]-Hitchcock[7] error. We conclude that the Tedder standard was not applied in an unconstitutional manner and that the result of that application -- an override of the jury's recommendation -- is neither arbitrary nor irrational in this case.

As previously noted, the Florida jury override standard enunciated in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) states that "to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence

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[5] Lockett v. Ohio, 438 U.S. 586 (1978).

[6] Eddings v. Oklahoma, 455 U.S. 104 (1982).

[7] Hitchcock v. Dugger, 481 U.S. 393 (1987).

of death should be so clear and convincing that virtually no reasonable person could differ." The Florida Supreme Court later emphasized the deference to be accorded a jury's life recommendation, noting that it "should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

The constitutional errors involved in the Lockett-Eddings-Hitchcock cases are not present in the case at bar. In Lockett v. Ohio the Supreme Court struck down a death penalty statute that prevented the sentencer from considering mitigating evidence relating to the defendant's character, record, and circumstances of the offense, in violation of constitutional standards that required individualized consideration of mitigating factors. In Eddings v. Oklahoma, the Supreme Court vacated the petitioner's death sentence because the sentencing judge had refused, as a matter of law, to consider the defendant's proffered mitigating evidence of his upbringing and mental disturbances. Finally, in Hitchcock v. Dugger, the Supreme Court reversed and remanded a death sentence rendered by a Florida judge who had followed the jury's recommendation of death. The Hitchcock trial court had instructed the jury not to consider and itself refused to consider mitigating evidence not made a mitigating factor by the statute.

The district court did not find that any Lockett-Eddings-Hitchcock error occurred, but stated: "It would be an

exercise in futility to require that nonstatutory mitigating circumstances may be presented, as Lockett establishes, to impose an obligation on the sentencing authority to listen to that evidence, as Eddings demands, and to extend that obligation to the advisory jury, as Hitchcock holds, unless nonstatutory mitigating evidence can form a basis for a jury life recommendation." Slip op. at 27.[8] The district court then discussed its review of the record, finding it replete with facts to support the jury's recommendation. Id. at 30-34. The district court referenced the trial court's statement regarding mitigating factors in this case to imply that the Florida courts had refused to consider all the mitigating evidence Lusk offered, thus violating Lockett-Eddings-Hitchcock in applying the Tedder standard.

Our independent review of the record reveals that no Lockett-Eddings-Hitchcock error was committed. Taken in context, the trial court's findings at sentencing dispel the notion that it refused to consider the nonstatutory mitigating evidence which was presented:

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[8] We do not disagree with this statement by the district court, but we abjure any implication therein that the existence of any mitigating evidence in the record, whether statutory or not, means that a trial judge cannot constitutionally override a jury recommendation of life. See Parker v. Dugger, 876 F.2d 1470 (11th Cir. 1989) (reversing district court's grant of habeas relief as to death sentence imposed when trial judge overrode jury recommendation of life; record contained evidence that under some circumstances could support a life recommendation, but which did not outweigh clearly established statutory aggravating evidence).

There are no mitigating circumstances either under those prescribed by statute or otherwise. At the penalty phase of the trial the Defendant presented evidence, which was allowed by the court, to show that the victim was serving a 30-year sentence for second-degree murder in the stabbing of a prison inmate at another institution.

Although not argued, the inference suggested to be drawn from such evidence may have been that the life taken was one not meriting consideration of the death penalty by the Defendant. This court cannot and does not entertain such a concept, but genuinely believes that the life of the victim, the life of this Defendant, and the lives of all prison inmates are to be protected by the same consideration given to all mankind.

The murder of a prisoner, and even one who also is guilty of a prior murder, is as reprehensible in our society as any other and deserves the same punishment.

There are no mitigating circumstances and the aggravating circumstances are clear, abundant, and convincing, which compel a finding and determination by this court that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

This court has not limited its consideration of mitigating circumstances to only those prescribed by statute, but has limited its consideration of aggravating circumstances to those specified in Section 921.141, Florida Statutes.

Even if it were determined, that the findings of this court, of aggravating circumstances under section 921.141(5)(c) and (h) of Florida Statutes, are not in conformity with the findings of those whose ultimate responsibility it is to review and determine such matters, the undisputed and multiple findings under section 921.141(5)(a) and (b) of Florida Statutes alone, far outweigh any mitigating circumstances.

Sentencing Tr. at 14-15 (Appendix Vol. 1, p. 593-94).

The district court, we find, improperly engaged in reweighing the evidence after the Florida courts determined

that the override was constitutional and proper because there was no reasonable basis to support the recommendation. The district court's opinion reveals as much: the court found that Lusk's fear of his victim was established in the record "to the degree necessary for it to constitute a reasonable basis for the jury's recommendation," slip op. at 31-32, and that "[t]he matter is one of degree; it is entirely reasonable for a jury to conclude . . . that petitioner was culpable of first-degree murder yet his culpability did not rise to a level that merited the moral judgment of death." Id. at 33.

The Florida courts did not consider the mitigating evidence Lusk presented to provide a reasonable basis for sustaining the jury's recommendation of life imprisonment when balanced against the several aggravating factors. The supreme court determined that the jury was made aware of the victim's reputation for violence, Lusk II, 498 So.2d at 905, and that the jury's recommendation "was not based on any valid mitigating factor discernible from the record." Lusk I, 446 So.2d at 1043. That court further determined from a review of the record that the trial judge "did not ignore evidence presented by Lusk in mitigation," but found it "clear that the trial judge did not believe that said evidence in its totality rose to the level of mitigation in Lusk's case." Id. The state supreme court thus held that the dictates of Tedder had been satisfied.

The state trial court acknowledged that it considered the mitigating evidence offered by Lusk in his trial, as did the Supreme Court of Florida. This court may examine the application of Florida's jury override scheme, Parker v. Dugger, 876 F.2d 1470, 1474 (11th Cir. 1989), but we may not second-guess the state courts regarding whether the trial court "complied with the mandates of Tedder." Id. at 1475. It is not our function to decide whether we agree with the advisory jury or with the trial judge and the Supreme Court of Florida. Our review, rather, is limited to ascertaining whether the result of the override scheme is arbitrary or discriminatory. Spaziano v. Florida, 468 U.S. 447, 465 (1984). Lusk contends that we should grant only limited deference to state override proceedings. On the contrary, to the extent that those proceedings do not produce an arbitrary or discriminatory result, the Constitution is not violated, and we will not second-guess the state courts on a matter of state law. The state courts concluded that there were no reasonable bases for the jury's recommendation despite the fact that both the jury as advisor and the judge as sentencer were made aware of mitigating factors. On the facts of this case, we do not find that the result of the application of Tedder was arbitrary or irrational.

IV. Conclusion

Because it granted relief as to the sentence on the basis of the jury override, the district court did not address other claims asserted by Lusk which challenge his sentence.[9] While we could address those claims, see Lindsey v. Smith, 820 F.2d 1137 (11th Cir. 1987), we conclude that a proper exercise of our discretion in this case, given the nature of the claims and the issues presented, is to remand them to the district court so that the district court may address them in the first instance. The judgment of the district court is REVERSED to the extent that it grants relief on the jury override issue and AFFIRMED on all other issues. The case is REMANDED to the district court for consideration of the claims that court has not yet addressed.

---

[9] These claims are: (1) that Lusk's death sentence violated the Eighth Amendment because it was based on the unconstitutionally vague statutory aggravating circumstance that the murder was "especially heinous, atrocious or cruel;" (2) that the Florida death penalty statute improperly shifted the burden of proof to the defendant to show that mitigating circumstances outweighed aggravating circumstances; (3) that Lusk was denied due process because counsel failed to review the presentence report with him prior to sentencing and because the trial court failed to ascertain whether Lusk had reviewed the report; and (4) that Lusk's Eighth Amendment rights were violated because the state trial judge believed that he was barred from considering notions of mercy in his sentencing decision.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

Case No. 89-5961

ROBERT LACY PARKER

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF REGARDING QUESTION 1 (JURY OVERRIDE ISSUE)

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QUESTIONS PRESENTED

Is the application of Florida's jury override standard in an individual case subject to an Eighth Amendment review, and, if so, what standard of review is applicable?

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PETITIONER'S SUPPLEMENTAL BRIEF
REGARDING QUESTION 1 (JURY OVERRIDE ISSUE)

In Clemons v. Mississippi, 110 S.Ct.1441 (1990), this Court held that the Eighth Amendment does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by re-weighing of the aggravating and mitigating evidence, or by harmless error review. However, this Court also noted that, in a state whose death penalty scheme requires the weighing of aggravating circumstances against mitigating circumstances, the Eighth Amendment prohibits the automatic affirmance of a death sentence simply because there are one or more remaining valid aggravating circumstances. Clemons, id., at 1450. In Clemons, this Court vacated the judgment and remanded to the Mississippi Supreme Court for clarification as to whether the Mississippi Supreme Court had applied a harmless error analysis in affirming the death sentence, or whether the court had utilized a re-

weighing process. In doing so, this Court recognized that the application of the harmless error rule to Mr. Clemons was subject to an Eighth Amendment arbitrariness challenge. Id. at 1451.

Florida, of course, is a "weighing" state. Florida law requires that the jury render an advisory sentence based upon three factors: (a) whether sufficient aggravating circumstances exist, (b) whether sufficient mitigating circumstances exist which out-weigh the aggravating circumstances found to exist, and (c) based on these considerations, whether the defendant should be sentenced to life imprisonment or death. Section 921.141(2), Florida Statutes (1981). Florida law further requires that the trial court judge, after receiving the recommendation of the jury, also weigh the aggravating and mitigating circumstances and determine if there are sufficient aggravating circumstances to justify a sentence of death, and that there are insufficient mitigating circumstances to out-weigh the aggravating circumstances. Section 921.141(3), Florida Statutes (1981). In Mr. Parker's case, the jury was not only instructed in accord with Florida law, but was also provided a specific verdict form which required it to find, first, whether sufficient aggravating circumstances existed to justify a sentence of death, and, second, to find whether sufficient mitigating circumstances existed which out-weighed any aggravating circumstances (A-8). The trial court judge, in overruling the jury's recommendation of life imprisonment, found that "there are no mitigating circumstances that out-weigh the aggravating circumstances" (A-7).

In reviewing the jury override death sentence imposed upon petitioner, the Florida Supreme Court found that two of the aggravating circumstances found by the trial court judge were invalid, including the "felony murder" aggravating circumstance and the "heinous, atrocious and cruel" aggravating circumstance. Parker v. State, 458 So.2d 750, 754 (Fla.1984). As this Court has stated in Clemons, the proper procedure for the Florida Supreme Court at this point should have been for the appellate court to either re-weigh the aggravating and mitigating circumstances, or to apply a harmless error analysis. The harmless error analysis, requires a finding that beyond a reasonable doubt the sentence would have been the same even without the improperly found aggravating circumstances. Clemons, id., at 1451. The Florida Supreme Court's entire discussion of the matter, however, was as follows:

> The trial court found no mitigating circumstances to balance against the aggravating circumstances, of which four were properly applied. In light of these findings the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908 (Fla.1975). The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty has been found appropriate. Spaziano v. Florida, 468 U.S.447, 104 S.Ct.3154, 82 L.Ed. 2d 340 (1984).
>
> Accordingly, the sentence of death is affirmed. Parker, id., at 754-5.

The contention here is that the Florida Supreme Court has arbitrarily applied the Tedder standard to affirm Mr. Parker's death sentence. The impression given from a reading of the Florida Supreme Court language quoted above is that the court affirmed the

death sentence simply because there were four aggravating circumstances and no mitigating circumstances. It appears to be either an automatic affirmance of the sort condemned in Clemons, or a harmless error analysis based upon a "clear and convincing" standard as opposed to a "beyond a reasonable doubt" standard. In either event, the analysis would be constitutionally flawed under Clemons.

However, the Eleventh Circuit Court of Appeals interpreted the above-quoted language to mean that the Florida Supreme Court "held that the remaining four statutory aggravating circumstances sufficiently out-weighed the mitigating circumstances to justify the trial court's decision to override the jury's recommendation." Parker v. Dugger, 876 F.2d 1470, 1473 (11th Cir.1989). Despite the Florida Supreme Court's pronouncement that there were no mitigating circumstances to weigh against the aggravating circumstances, the Eleventh Circuit found that there were numerous non-statutory mitigating circumstances that were considered and weighed by the trial court judge:

> The trial of this case occurred after Lockett v. Ohio, 438 U.S.586, 98 S.Ct.2954, 57 L.Ed.2d 973 (1978) (requiring consideration of non-statutory mitigating circumstances) was decided and Fla.Stat.§921.141 was amended to require Florida trial courts to consider non-statutory mitigating circumstances. Given this and the fact that the trial judge listened to copious evidence of non-statutory mitigating circumstances presented by Parker during the sentencing phase, we are convinced that the trial judge did in fact consider and weigh non-statutory mitigating circumstances before deciding to sentence Parker to death. Parker v. Dugger, id., at 1475 n.7.

From the foregoing, there appear to be serious infirmities with Petitioner's death sentence. Under Clemons, the Florida Supreme Court could not automatically affirm the death sentence simply because there were four aggravating circumstances and no mitigating circumstances. If the Florida Supreme Court applied a harmless error analysis, it apparently utilized a clear and convincing evidence standard of review as opposed to the constitutionally required beyond a reasonable doubt standard. Finally, if the Florida Supreme Court re-weighed the aggravating and mitigating circumstances, it failed to consider the "copious evidence of non-statutory mitigating circumstances" in the weighing process, because it interpreted the trial judge's findings to be that there were no mitigating circumstances.

If the Florida Supreme Court applied a harmless error analysis here, it should be required to say so, and to apply the correct standard of review. If the Florida Supreme Court re-weighed the aggravating and mitigating circumstances here, it must be required to consider the mitigating circumstances that were presented at the trial court level. If the Florida Supreme Court failed to consider the mitigating circumstances that the Eleventh Circuit Court of Appeals found that the trial court judge considered, then the re-weighing conducted by the Florida Supreme Court would itself violate the dictates of Lockett v. Ohio, 438 U.S.586 (1978), and Eddings v. Oklahoma, 455 U.S.104 (1982). The language utilized by the Florida Supreme Court in affirming Mr. Parker's death sentence is, if anything, even more "cryptic" and "unclear" than the

language from the Mississippi Supreme Court that affirmed the death sentence in Clemons. Certiorari should be granted.

CONCLUSION

The decision of the Florida Supreme Court in affirming Petitioner's death sentence is inconsistent with the decision of this court in Clemons v. Mississippi. This Court should grant certiorari to consider the application of Clemons to the decision of the state supreme court in Mr. Parker's case.

Respectfully submitted,

SAALFIELD, CATLIN, COULSON,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mark Menser, Esquire, Assistant Attorney General, The Capitol, Tallahassee, FL 32301 by Mail, this 2 day of May, 1990.

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Attorney

Supreme Court, U.S.
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No. 89-5961

In The

Supreme Court of the United States

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Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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In the Circuit Court in and for Duval County, Florida
Florida v. Robert L. Parker

Case No. 82-1658CF

[2001] * * * And then we have – in the prior case we had the element of kidnap on Padgett, I did not give – I gave the element of kidnap on Padgett, that is, two, the death occurred as a consequence of and while defendant was engaged in the commission of the crime of kidnapping. The other part, the death occurs as a consequence of and while attempting to commit; one, death occurred as a consequence of and while the defendant or an accomplice was escaping from the immediate scene. I don't think those two are applicable. But I will be happy to hear you on them.

MR. AUSTIN: Which is not applicable? Kidnapping is applicable.

THE COURT: We are not talking about that. Death occurred as a consequence of and while defendant was attempting to commit, attempting to commit.

MR. GREENE: Yeah.

THE COURT: And the one below that, death occurs as a consequence of and while the defendant or an accomplice was escaping from the immediate scene of –

MR. AUSTIN: Oh.

THE COURT: I will hear you gentlemen on this.

MR. GREENE: I agree the second and third. As far as one, I think it ought to be given, I think it ought to be kidnapping.

[2002] THE COURT: Robbery?

MR. GREENE: As to Padgett and robbery as to Nancy Sheppard.

THE COURT: I will hear you on it, Mr. Link.

MR. GREENE: And I would argue, even though I didn't argue last time because I really didn't think about it, but the testimony was clear this time that he took the woman's clothes, Jody Dalton's, and burned them. And I think the jury could find that, you know, they did take her clothes with force and violence.

THE COURT: Well, all right. On the other part there on the kidnapping and robbery, I will hear you, Mr. Link, on number two.

MR. LINK: All right. I would agree that the second two paragraphs under number two should not be given. We object to any instruction on felony murder. We were not given a bill of particulars as to whether the State was relying upon a premeditated or felony murder theory and we feel that since the indictment alleged premeditated murder they should be forced to prove premeditated murder. No felony is alleged in the indictment or in a statement of particulars as to what felony they are relying upon.

We also feel that there is no evidence that there was a kidnapping or that there was a robbery in any of [2003] these murders.

THE COURT: Mr. Greene?

MR. GREENE: Well, obviously the law clearly is and it's even in the beginning of the standard jury instructions or recognizes that we don't need to charge it in the indictment, we don't need to choose. And –

THE COURT: All right.

MR. GREENE: And I think it ought to be given clearly, though no one said we were robbing Padgett or kidnapping Padgett, I mean, the evidence is clear the jury could circumstantially – the jury could infer that's exactly what was going on.

THE COURT: Well, insofar as submitting both felony murder and premeditated murder, the law is clear on that and that doesn't bother me. But you take exception to the kidnapping and robbery?

MR. LINK: Yes, sir.

THE COURT: All right. I intend to give it on both of them.

Number three, that the defendant was the person who actually killed padgett and/or Sheppard or Dalton. Wait a minute. We have got Sheppard and – Sheppard and Padgett, but we don't have it on Dalton. I will hear you on 3(a) and (b).

* * *

[2062] MR. LINK: We feel that's a correct statement of the law as to aiding and abetting a first degree murder, premeditated first degree murder. And we feel jury instructions as it stands are not adequate.

THE COURT: You cite 18 Fla. 9-9 (1882).

MR. LINK: It's been law for a long time, Judge.

THE COURT: 1933.

MR. LINK: As it is, it has been an awful long time, but that's what qualified it in the jury instructions that exist now. So I justify –

THE COURT: I will not give that anyhow, deny that. Number two.

"First degree murder is divided into two categories: premeditated murder and felony murder.

"In order to find the defendant guilty of first degree murder, it shall be necessary for you to specify in your verdict whether the defendant is guilty of first degree murder by premeditated murder or whether he is guilty of first degree murder by felony murder. Your verdict in this regard must be unanimous. Of course, if you are not convinced beyond every reasonable [2063] doubt that the defendant is guilty of first degree murder, then you must find him not guilty as to that charge."

Now, he's cited this Fifth Federal DCA.

MR. LINK: Yes, sir. That relates to Gibson, it was not a murder case, it was a dealing in stolen property case, but the case, basically, holds that a defendant is entitled to a unanimous verdict when there are different ways of committing a crime stated within a single statute. And the specific way must be alleged in the indictment and must be proved by the State. And the defendant is entitled to a unanimous verdict as to which way the crime was committed.

THE COURT: Anyhow, that's not the law in the State of Florida and it's not required under the standard jury instructions. I think it would be error to do it that way. I deny it.

Defendant's requested standard jury instruction number three.

"A defendant's version of a homicide cannot be ignored where there is an absence of other evidence sufficient to contradict his explanation."

* * *

[2109] THE COURT: No, I did that in the Groover case and the reason I think it was confusing, I thought about it, I changed it.

MR. LINK: It is confusing, I was just thinking about it. I don't know which is better.

THE COURT: I don't know which is better, but I think this way is better. I spent some time thinking about it last night. And if you say and – and/or any of them, then they can't -- they have got to find them dead before they can come back with a verdict. So I just think leave it the way it is.

If you find that Richard Padgett, Nancy Sheppard and Jody Dawn Dalton were killed by the defendant, you will then consider the circumstances. I had it the other way and/or, and/or, and/or either of them or either of them, but I think it's confusing and I decided to do it this way because – if they don't find them dead, then they can't come up with a verdict.

On the next page, in murder in the first degree, number one, that Richard Padgett, Nancy Sheppard, Jody Dawn Dalton are dead. Two, that the death was caused by the criminal act or agency of the defendant. Three, that

there was a premeditated killing of Richard Padgett, Nancy Sheppard and Jody Dawn Dalton.

And then on felony murder it's this way, if you [2110] will follow me. Number one, that Richard Padgett and Nancy Sheppard are in fact dead. Two, that the death occurred as a consequence of and while the defendant was engaged in the commission of the crime of kidnapping of Richard Padgett and the crime of robbery of Nancy Sheppard. Three (a), that Richard Padgett was killed by a person other than the defendant who was also involved in the commission of – commission or attempt to commit kidnapping of Richard Padgett, but that the defendant was present and did knowingly aid, abet, counsel, or hire, or otherwise procure the commission of the kidnapping.

(b), that Nancy Sheppard was killed by a person other than the defendant who was also involved in the commission or attempt to commit robbery of Nancy Sheppard, but the defendant was present and did knowingly aid, abet, counsel, or otherwise hire or otherwise procure the commission of the robbery.

Agree? Does that state the law? That's what we went over last night.

MR. LINK: Yes, sir, I believe I objected to the kidnapping and –

THE COURT: I know, but do you agree?

MR. LINK: – and the robbery instructions.

THE COURT: But you agree if I am going to give it, [2111] that's the way it ought to be given?

MR. LINK: Yes, sir.

THE COURT: All right. And then for the purpose – next is kidnapping. For the purpose of this case, the crime of kidnapping is defined as: kidnapping means forcibly, secretly, or by threat, confinement, abducting, or imprisoning another person against his will and without lawful authority with the intent to hold for ransom or reward or as a shield or as a hostage to commit or facilitate the commission of any felony or to inflict bodily harm upon or to terrorize the victim or another person.

And that's it. I am not going to give four because it talks about some governmental function and there's no evidence of that.

Now, I'd like, if I can do it with your permission, next to say the definition of robbery. For the purpose of this case, the crime of robbery is defined as the taking of money or property from the person or custody of another by force, violence, or assault or by putting the victim in fear. The property taken must be of some value and at the time of the taking the defendant must have intended to permanently deprive the victim of the money or property.

Is that agreeable, Mr. Link?

[2112] MR. LINK: Yes, sir.

THE COURT: Mr. Greene?

MR. GREENE: Yes, Your Honor.

THE COURT: All right. Second degree – follow me on that, get down to the numbers. Number one, that Richard Padgett, Nancy Sheppard – no, that applies to all of them. That the death was caused by the criminal act.

And three, that there was an unlawful killing of Padgett, Sheppard and Dalton, by an act imminently dangerous to another, evincing a depraved mind. It applies to all of them.

* * *

[2092] MR. GREENE: The State's got – these are the State's requested jury instructions. I have got seven of them.

THE COURT: Number one I am not going to give. I don't think it's proper. The standard jury instructions comment on it and I have already defined it.

And, incidentally, gentlemen, can I get you to agree on something before I forget it? Would you agree to this definition of robbery? Let me finish up these. In any event, I will deny State's requested jury instruction number one.

Number two.

"Proof of a homicide committed in the perpetration of a robbery or kidnapping may be shown under an indictment charging the unlawful killing –" I gave that in the Groover case, I think that's a proper instruction. I will hear you on it, Mr. Link.

MR. LINK: I would object to it being given. I think, Your Honor, if Your Honor is going to be instructing on felony murder anyway, it's pretty obvious that they can do that.

THE COURT: I know they can, but it says in here premeditated murder. And then it says in the indictment premeditated murder and then we start reading

felony murder instruction. And so I think this is explanatory [2093] of that transition from premeditated murder to felony murder. I think it's proper and I grant that.

MR. LINK: Consistent with our previous motions and objections, we do object to it because we feel the indictment should allege either premeditation or felony murder or both.

THE COURT: Okay. Number three.

"Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used –"

I will not give that.

Four.

"Coercion or duress is not available as a defense in a case of homicide or attempted homicide. Coercion or duress does not excuse or justify the murder or attempted murder of an innocent third party."

Now, I did give that in the Groover case and I believe I am going to take that under advisement. I believe that I took the instructions – is that the way I wrote it? I don't recall how I did it. Let me look just a second.

* * *

[2087] MR. GREENE: That's exactly the statement of the law. I mean, you tell them about contradictory statements to whether or not they previously made statements contrary to their present testimony. That's exactly like the last five or six requested jury instructions except it purports to define a deposition, and deposition is merely a prior statement. I think the jurors understand that.

THE COURT: As I say, I would have done it during the course of the trial, but I am not going to do it now.

MR. GREENE: Unless you want to add the State doesn't have the right to take the defendant's deposition.

THE COURT: "One of the defenses asserted in this case is that the defendant participated in the alleged offense under duress; that is, that he was forced to participate in the offense alleged. In order to constitute a defense, the coercion or duress must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done."

Now, that was – we had that – we had that in the Groover.

MR. LINK: Well, –

[2088] MR. GREENE: Well, I have got – this implies that coercion is a defense and, obviously, it clearly is not. And the State has got a requested instruction saying coercion to murder is not a defense and would –

THE COURT: One of the defenses – this is taken from the Koontz case. That's it.

"One of the defenses asserted in this case is that the defendant participated in the alleged offense under duress; that is, that he was forced to participate in the offense alleged. In order to constitute a defense, the coercion or duress must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm."

That was in the Ellwood case.

MR. LINK: Yes, sir.

MR. GREENE: This is an entire misstatement of the law because there is no law in the state, none of these are murder cases I am confident.

MR. LINK: That's correct.

MR. GREENE: That's right, because direct coercion is not a defense or duress is not a defense to the charge of murder.

THE COURT: In the Groover case we had –

MR. GREENE: I have got it here, Judge, but we just [2089] haven't got it here as far as the requested jury instruction. I have a requested jury instruction that says that coercion or duress is not available as a defense in the case of homicide or attempted homicide. Coercion or duress does not excuse or justify the murder or attempted murder of an innocent third party.

THE COURT: 382 So. 2d 796; is that Koontz?

MR. GREENE: No, it's Cawthon.

MR. LINK: I don't believe that's a correct statement of the law either as stated there.

MR. GREENE: It's the quote right out of the opinion.

MR. LINK: Well, it's limited to cases of premeditated murder and, I believe, the law is clear that it is –

MR. GREENE: No, it does not say that, I beg to differ with you. If you want to get the opinion.

THE COURT: Now, I am not going to give this one. I know that does not apply to the homicide case. I don't believe that is the law and I don't intend to give number thirty-five.

MR. LINK: Well, it's our contention as to duress that unless – that a duress instruction would be applicable and appropriate for a defendant who is not an actual perpetrator and it would be a defense to an [2090] aider and abettor in a homicide.

THE COURT: Those cases don't say that.

MR. LINK: I understand that. I feel that the law is somewhat in a state of flux there and differs from jurisdiction to jurisdiction. I think the Florida cases that infer it is not a defense for aider or abettor are incorrect.

THE COURT: Now, number thirty-six.

"For a conviction under felony murder, there must be direct causal connection between the homicide and the felony. Something more than mere coincidence of time and place between the two must be shown; otherwise, the felony murder rule would not be applicable. There is therefore no criminal liability for murder on the part of a co-felon when the homicide was a fresh and independent product," et cetera. I will not give that. That's covered in the standard jury instruction.

Number thirty-seven.

"Under the law of felony murder, there is no criminal liability where the homicide was a fresh and independent product –" I will not give that. That's covered by our standard jury instructions.

MR. LINK: We feel this is a statement of independent intervening act defense to felony murder and should be given.

* * *

[2092] MR. GREENE: The State's got – these are the State's requested jury instructions. I have got seven of them.

THE COURT: Number one I am not going to give. I don't think its proper. The standard jury instructions comment on it and I have already defined it.

And, incidentally, gentlemen, can I get you to agree to something before I forget it? Would you agree to this definition of robbery? Let me finish up these. In any event, I will deny State's requested jury instruction number one.

Number two.

"Proof of a homicide committed in the perpetration of a robbery or kidnapping may be shown under an indictment charging the unlawful killing –" I gave that in the Groover case, I think that's a proper instruction. I will hear you on it, Mr. Link.

MR. LINK: I would object to it being given. I think, Your Honor, if Your Honor is going to be instructing on felony murder anyway, it's pretty obvious that they can do that.

THE COURT: I know they can, but it says in here premeditated murder. And then it says in the indictment premeditated murder and then we start reading felony murder instruction. And so I think this is explanatory [2093] of that transition from premeditated murder to felony murder. I think it's proper and I grant that.

MR. LINK: Consistent with our previous motions and objections, we do object to it because we feel the indictment should allege either premeditation or felony murder or both.

THE COURT: Okay. Number three.

"Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used –"

I will not give that.

Four.

"Coercion or duress is not available as a defense in a case of homicide or attempted homicide. Coercion or duress does not excuse or justify the murder or attempted murder of an innocent third party."

Now, I did give that in the Groover case and I believe I am going to take that under advisement. I believe that I took the instructions – is that the way I wrote it? I don't recall how I did it. Let me look just a second.

MR. GREENE: I believe it was given, I just quoted it from the opinion, Judge. I just got it right out of the opinion of Cawthon, a First DCA case that says, "The coercion defense is not available in a case of [2094] homicide or attempted homicide. The coercion defense has

received recognition in two Florida cases. Hall involved the use of the defense in a perjury trial. Koontz involved an attempted robbery. The defense has never been recognized in a Florida case involving homicide or attempted homicide. The general authority is that coercion does not excuse or justify the murder or attempted murder of an innocent third party. We align ourselves with that general authority, period."

THE COURT: Bring me that case.

MR. LINK: I think that case has a very brief discussion and it's not as detailed as the decision of Wright versus State.

THE COURT: Oh, yeah. That's the one. I had which one?

MR. LINK: Wright, 402 So.2d 493 which has a considerably more extensive discussion.

THE COURT: Have you got it highlighted someplace?

MR. LINK: Probably not.

THE COURT: Well, highlight what you are talking about, I intend to give an instruction on it. I will look at both of them. I did give this in the Groover case, I am going to grant as modified and I don't know what the modification would be.

MR. LINK: I would request a modification to the [2095] effect that it is a defense to felony murder where the killer is not a – is not the actual killer. He's simply been forced to participate in the underlying felony.

THE COURT: It doesn't say that.

MR. GREENE: Sure doesn't.

THE COURT: Neither one of those cases say that.

MR. LINK: Yes, sir.

THE COURT: It says it in there?

MR. LINK: Wright indicates that it is quite – there is a footnote on Wright. "Where duress is offered as a defense to first degree murder under felony murder charge, a different question is presented, since duress is a recognized defense to the underlying felony, and the rationale of the rule prohibiting the duress defense in the crime of homicide appears applicable."

THE COURT: Well, highlight what you want me to look at.

MR. GREENE: I think this, obviously, this Wright is a Third DCA case and we have got a First DCA case that is pretty darn clear on it and doesn't make any distinction. I don't see how you can make any distinctions, we are not talking about duress to robbery or kidnapping, we are talking about duress to the [2096] murder.

MR. LINK: There's an entire section discussing duress here.

THE COURT: Okay. All right. I will give it as modified and I will come up with something on that.

MR. LINK: Consistent with out request on the duress instruction we, of course, would object to any instruction stating duress is not a defense to –

THE COURT: If you don't argue, I won't give it, If you don't argue duress.

MR. GREENE: Waite a minute. The Defense already stated that on the witness stand. Whether he argues it or not, I think we have – we have got to have this instruction.

THE COURT: All right.

MR. GREENE: Whether Bob argues it or not, the defendant sure has.

THE COURT: Okay. Number five.

"It is the law of this state that every act and declaration of each member of a conspiracy is an act in declaration of the law and is therefore original evidence against each of them.

"There is no prerequisite that a conspiracy be judged before declarations or acts of co-conspirators are admissible under this rule of law."

* * *

[2102] MR. LINK: Well, even if that's so, it would only apply to the defendant's aggravated assault case and not to the murder charges because he was arrested for aggravated assault at that time. And that would be the only basis for admitting those statements as it relates to the aggravated assault charge.

THE COURT: Let me read it over. I will take it under advisement.

I will take – I have granted four as modified, we haven't decided how yet that is going to be modified.

MR. GREENE: I really would oppose any modification of four.

THE COURT: I haven't read it, I don't recall it that well. I have got the cite here, obviously I had it highlighted earlier.

MR. GREENE: The most is would be dicta in the Wright case and it's pretty clear the First DCA case was given sets out the law at these – in this district and the State of Florida.

THE COURT: I have granted four and two and I have taken six and seven under advisement.

* * *

[2117] Now, I have taken the duress instruction which I am going to read over, I have taken that under advisement. Who gave this on Loudd?

MR. LINK: Ralph did.

MR. GREENE: The case?

THE COURT: Yeah.

MR. GREENE: That's the case on – that deals with –

MR. LINK: Another person has pled guilty.

MR. GREENE: That's the case dealing with cautionary instruction.

THE COURT: Oh, yeah. Okay. All right. I have got it. I will do a cautionary instruction on that. I will read over the Loudd case to see whether or not this states all of the elements therein. I will grant that, but I am going to read it over and see whether or not it covers it.

Then we have the ones, the instruction on coercion and duress. I have taken that under advisement.

I have granted the one on number – the one which shows – it explains the transition. Which ones do I then have under advisement? The only one I have under advisement then is –

MR. GREENE: You have two, coercion and exculpatory statements.

MR. LINK: You have – well, you may modify the [2118] cautionary instruction somewhat. Coercion is under advisement.

THE COURT: Wait a minute. See which ones I have. I have one on coercion that is under advisement for modification. Then I have one on the transition between felony murder and murder in the first degree, kidnapping, et cetera. And then I have the one on the behavior of the defendant, the ex post facto things, that's under advisement. Now, what was the other one?

MR. LINK: As to exculpatory statements was under advisement.

THE COURT: Which number was that – here it is. I am sorry.

MR. GREENE: I gave you all those cases on them.

THE COURT: Yeah. All right.

(On Tuesday, March 8, 1983, court recessed at 5:00 o'clock p.m. to be reconvened on Wednesday, March 9, 1983, at 1:00 o'clock p.m.)

March 9, 1983

* * *

[2119] pursuant to adjournment of the preceding session, and the following further proceedings were had out of the hearing of the jury:)

THE COURT: Gentlemen, you got my charges there?

MR. GREENE: Yes, Your Honor.

THE COURT: Would you hand them to the Clerk?

I will hear exceptions and objections by the State and the Defense. I am not sure of the order in which these are in, I just threw them together. I think they are pretty much in the order I am going to give them, but we just finished them a short time ago.

MR. LINK: I would renew all previously stated objections and requests I made at charge conference. Particularly here I would renew my objection to the instruction that coercion is not a defense to homicide. I believe it's too general an instruction. Coercion is a defense to felony murder.

THE COURT: Well, if that's not what that case is, then I stand to be corrected. But I read it over, I read

all the cited cases in the Cawthon case, I read the Hall case and what was the other one?

MR. LINK: The Wright decision.

[2120] THE COURT: The one subsequent to the Cawthon case, the one you cited

MR. LINK: Yes, sir.

THE COURT: If you read that case over, that says clearly and unequivocally it is not. The only distinction they made was a possibility if a felony murder was charged under certain circumstances, but even then it was equivocal. And I read that thing until about – well, all the cases that were cited in both of them, by both the State and the Defense in your proposed instructions, I read them over until about – that and other cases until about 11:30 last night. I don't think there is any question or doubt that this instruction on coercion and duress is the law in the State of Florida. It certainly does not apply.

In addition to that, the cite you gave was a Third DCA, it did not say that there was any moderation or change of the law in the Cawthon case. In fact, they cited the Cawthon case. But they did say and they equivocated whether or not in view of the felony murder, whether it might be a defense. But even so, the factual situation in the cases they cited is different from the one that we have here. So I think this is the law, it's the law of the State of Florida, [2121] it's the Florida Supreme Court holding and I think that is the law and I am going to give it.

MR. LINK: I would object, also, on the ground we are not going to be arguing duress as a defense

anyway and I feel that sort of instruction is improper and misleading.

THE COURT: Well, you may not argue it, but if threats and intimidation and duress were not the defendant's testimony when he testified, the State has based their, I assume they didn't, they don't – they, obviously, submitted this instruction on the basis of his testimony, had he not testified in that manner, I'm sure the State would not have requested the charge. That is the way I heard his testimony.

What say you, Mr. Greene?

MR. GREENE: Yes, Your Honor, that was exactly the reason. In fact, the defendant did state during cross examination that he was coerced and that his defense was coercion. If my recollection is correct, he stated that on cross examination to a question that I asked him. And, certainly, his testimony is to that effect. He said everything he did was because he was afraid and because his family had been threatened and because he had been threatened. I mean, if – if that isn't his defense, then his testimony just doesn't make [2122] any sense at all.

It's inconceivable, I think, that is his defense, as he said during cross examination.

THE COURT: Mr. Link, do I understand that you are not going to say he was threatened or intimidated?

MR. LINK: No, sir.

THE COURT: You are not?

MR. LINK: No, sir.

THE COURT: Well, even so he did.

Now, let's go on to the next one. We will go ahead, you have already made your exceptions and objections to them the other night – last night when we went over the charges after we left and courtroom. And these are the ones that you gentlemen submitted to me. Whether you agree with them or not, do you agree these are the ones that you submitted?

MR. LINK: Yes, sir.

THE COURT: Mr. Greene, you also agree these are the ones you submitted?

MR. GREENE: Yes, sir.

* * *

[1963] A Yes, sir.

Q You left that out in giving the testimony to him; hadn't you?

A No, I just didn't think about it.

Q Didn't think about it?

A No, sir.

Q All you have done for the last year is think about this; isn't it?

A I thought about it; yes.

Q You are well coached; aren't you?

A No, sir.

Q He's been coaching you day in and day out; hasn't he?

A He's talked to me, he hasn't been coaching me.

Q He even talked to you today during the recess; didn't he?

MR. LINK: He's commenting on the rule of Defense Counsel.

THE COURT: Excuse me?

MR. LINK: I think this is improper comment at this point.

THE COURT: I think he's asking whether or not he had an opportunity to go over his testimony. I don't think that is improper.

BY MR. GREENE:

[1964] Q You even talked to him during the recess a little while ago; didn't you?

A Yes, sir, I did.

MR. LINK: I have to object at this point and I would object and I would move for a mistrial.

MR. AUSTIN: Your Honor, he worked on us for talking to witnesses all through the trial, we got a right to make these inquiries.

THE COURT: Counsel, what is the distinction between the questions you asked?

MR. LINK: May we approach the bench? I can explain.

THE COURT: Excuse me?

MR. LINK: If we could approach the bench I could explain.

(The following further side-bar conference was had out of the hearing of the jury:)

MR. LINK: I would object and move for a mistrial at this time. The Prosecution making – is making a comment on the rule of Defense Counsel and they are cross examining the defendant about the communications with his attorney. That, I submit, is very similar to commenting upon the defendant's right to remain silent. There's a defense that is the same.

THE COURT: I am sorry. I missed the last part.

[1965] MR. LINK: That is the same as commenting upon his right to remain silent. I think It's analogous.

He's trying to use the fact that he's represented by an attorney against him, the fact he's talked with an attorney, his absolute right to consult with counsel. And the fact that he's asked for an attorney, the fact he's consulting with an attorney is clearly irrelevant to any issue in this case and cannot be used against him. It is a constitutional right that cannot be used against him during the course of the trial.

The fact that he's consulted with an attorney during the recess, he has an absolute right to do that according to the law – case law. And it cannot be used against him during a trial that he has availed himself of that. I would object to it and move for a mistrial based upon those comments.

MR. GREENE: That's incredible. He's just like any other witness when he is on the witness stand.

THE COURT: Well, Counsel, do I understand that you have a right to ask anyone and all State witnesses if they've conferred with Mr. Greene or the Prosecution, and if he's gone over their testimony and talked to them and told them not to change their story, that you can ask those questions of the State witnesses, but they can't ask similar questions of a Defense witness?

[1966] MR. LINK: Of the defendant; yes, sir.

THE COURT: What is the distinction again, now?

MR. LINK: Those people had no right – have no right to counsel. I was not commenting upon their right to counsel in any way, shape or form.

THE COURT: And it's your felling, then, that you can comment upon them talking to their witnesses, but they cannot while the defendant is a witness, they cannot ask the same questions of him?

MR. LINK: Yes, sir.

THE COURT: Deny the motion. Deny the motion for mistrial. Overrule the objection.

(At the conclusion of the side-bar conference the following further proceedings were had in the presence of the jury:)

BY MR. GREENE:

Q You have talked to him hundreds of times; haven't you?

A Yes, sir, several times.

Q Several; three?

A No, sir.

Q More like a hundred.

A Probably.

* * *

JACKSONVILLE,
FLORIDA
MARCH 9, 1983

STATE OF FLORIDA

vs.

ROBERT L. PARKER

IN THE CIRCUIT COURT,
IN AND FOR DUVAL
COUNTY, FLORIDA

DIVISION S

CASE NO. 82-1658CF

INFORMATION FOR
MURDER IN THE
FIRST DEGREE

[R.409-11]

VERDICT AS TO FIRST COUNT – (RICHARD PADGETT)

__X__ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE SECOND DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE THIRD DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MANSLAUGHTER.

_____ WE, THE JURY, FIND THE DEFENDANT NOT GUILTY.

SO SAY WE ALL,

/s/ Richard A. Levinson
FOREMEN

JACKSONVILLE,
FLORIDA
MARCH 9, 1983

STATE OF FLORIDA

vs.

ROBERT L. PARKER

IN THE CIRCUIT COURT,
IN AND FOR DUVAL
COUNTY, FLORIDA

DIVISION S

CASE NO. 82-1658CF

INFORMATION FOR
MURDER IN THE
FIRST DEGREE

VERDICT AS TO SECOND COUNT –
(NANCY SHEPPARD)

__X__ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE SECOND DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE THIRD DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MANSLAUGHTER.

_____ WE, THE JURY, FIND THE DEFENDANT NOT GUILTY.

SO SAY WE ALL,

/s/ Richard A. Levinson
FOREMEN

JACKSONVILLE,
FLORIDA
MARCH 9, 1983

STATE OF FLORIDA

vs.

ROBERT L. PARKER

IN THE CIRCUIT COURT,
IN AND FOR DUVAL
COUNTY, FLORIDA

DIVISION S

CASE NO. 82-1658CF

INFORMATION FOR
MURDER IN THE
FIRST DEGREE

VERDICT AS TO THIRD COUNT –
(JODY DAWN DALTON)

____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE.

____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE SECOND DEGREE.

__X__ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE THIRD DEGREE.

____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MANSLAUGHTER.

____ WE, THE JURY, FIND THE DEFENDANT NOT GUILTY.

SO SAY WE ALL,

/s/ Richard A. Levinson
FOREMEN

JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO. 82-1658CF

DIVISION S

[R.434-5]

STATE OF FLORIDA

vs.

ROBERT L. PARKER

ADVISORY SENTENCE AS TO FIRST COUNT –
(RICHARD PADGETT)

We, the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment without the possibility of parole for 25 years or to death, find:

1. Sufficient aggravating circumstances

   __X__ do

   _____ do not

   exist to justify a sentence of death.

2. Sufficient mitigating circumstances

   __X__ do

   _____ do not

   exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

3. Based on those considerations,

   A. __X__ Six or more members of the jury advise and recommend to the Court that the

defendant be sentenced to life imprisonment without the possibility of parole for 25 years.

B. ____ The majority of the members of the jury advise and recommend to the Court that the defendant be sentenced to death.

DATED March 14, 1983.

/s/ Richard A. Levinson
FOREMEN

JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 82-1658CF

DIVISION S

STATE OF FLORIDA

vs.

ROBERT L. PARKER

ADVISORY SENTENCE AS TO SECOND COUNT - (NANCY SHEPPARD)

We, the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment without the possibility of parole for 25 years or to death, find:

1. Sufficient aggravating circumstances

__X__ do

____ do not

exist to justify a sentence of death.

2. Sufficient mitigating circumstances

__X__ do

____ do not

exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

3. Based on those considerations,

A. __X__ Six or more members of the jury advise and recommend to the Court that the defendant be sentenced to life imprisonment without the possibility of parole for 25 years.

B. ____ The majority of the members of the jury advise and recommend to the Court that the defendant be sentenced to death.

DATED March 14, 1983.

/s/ Richard A. Levinson
FOREMEN

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO. 82-1658CF

DIVISION S

STATE OF FLORIDA

vs.

ROBERT L. PARKER

SENTENCE
OF
ROBERT L. PARKER

The defendant, Robert L. Parker, age 28, of 2710 Parrish Cemetery Road, Jacksonville, Florida, an admitted drug dealer and user, was convicted on March 9, 1983, of three counts of murder, as follows:

FIRST DEGREE MURDER of
Richard Allen Padgett, Age 23,
11550 Old Plank Road
Jacksonville, Florida

FIRST DEGREE MURDER of
Nancy Lee Sheppard, Age 17,
5700 Solomon Road
Jacksonville, Florida

THIRD DEGREE MURDER of
Jody Dawn Dalton, Age 21,
8510 Roosevelt Boulevard
Jacksonville, Florida

A Presentence Investigation Report with supplement (hereafter referred to as the PSI) has been provided to the Court and the defense, and the case was passed to this date for sentence.

I. INDICTMENT

The defendant was charged by original Indictment on February 25, 1982, and amended indictment on August 26, 1982, as follows:

"IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ROBERT L. PARKER on or between the 6th day of February, 1982, and the 7th day of February, 1982, in the County of Duval and State of Florida, unlawfully and from a premeditated design to effect the death of RICHARD PADGETT, did then and there kill the said RICHARD PADGETT by shooting him with a pistol and stabbing him with a knife, contrary to the provisions of Section 782.04, Florida Statutes.

SECOND COUNT

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge for a second count that ROBERT L. PARKER on or between the 6th day of February, 1982, and the 7th day of February, 1982, in the County of Duval and State of Florida, unlawfully and from a premeditated design to effect the death of NANCY SHEPPARD, did then and there kill the said NANCY SHEPPARD by shooting her with a pistol and stabbing her with a knife, contrary to the provisions of Section 782.04, Florida Statutes.

THIRD COUNT

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge for a third count that ROBERT L. PARKER on or between the 6th day of February, 1982, and the 7th day of February, 1982, in the County of Duval and State of Florida, unlawfully and from a premeditated design to effect the death of JODY DAWN DALTON, did then and there kill the said JODY DAWN DALTON by shooting her with a pistol, contrary to the provisions of Section 782.04, Florida Statutes."

2. EXPLANATION

This defendant, ROBERT PARKER, was charged with three co-defendants, ELAINE PARKER (Robert Parker's former wife), TOMMY GROOVER and WILLIAM LONG – with the first degree murders of Richard Padgett, Nancy Sheppard and Jody Dalton.

Elaine Parker and William Long previously entered into negotiated pleas with the prosecution whereby they pleaded guilty to murder in the second degree – and are yet to be sentenced. Long testified for the prosecution in the separate trials of Tommy Groover and Robert Parker.

In February of 1983 Tommy Groover was convicted of three counts of murder in the first degree and sentenced by me to death on two counts and life imprisonment without the possibility of parole for 25 years on the third count.

The actions of all of the co-defendants are so intertwined in the murders that it is necessary to refer to them in this sentence of Robert Parker.

Hereafter Robert Parker will be referred to as "defendant" or "Parker", Elaine Parker will be referred to as "Elaine", Tommy Groover will be referred to as "Groover", and William Long as "Long".

3. FACTS OF MURDERS

The facts and circumstances of these three murders are so senseless and vicious as to be almost unbelievable – yet they did happen, and three young people are dead.

The evidence at trial was that Parker was a drug dealer and Groover sold drugs for him. Groover owed Parker money for drugs he had sold to Richard Padgett and others. The day before the homicidal events began, Parker placed a rope over a tree limb and told Groover he would hang him if he did not pay the drug debt.

The day of the homicides Parker again threatened to kill Groover if he did not get the money. Later that day Groover, accompanied by Long, located Richard Padgett and his 17-year old girlfriend, Nancy Sheppard, in a nightclub. When Padgett was unable to pay the drug debt, Groover induced Padgett and the girl to accompany Long and himself to the house trailer occupied by Parker and his former wife, Elaine.

Padgett informed Parker and Groover that he did not have money to pay the drug debt – but that he could get money from some of his debtors.

Parker and Padgett went outside the trailer for further discussion – during which a shot was fired. As Parker and padgett returned to the trailer, Parker was carrying a pistol in his belt. Nancy was alarmed at this turn of events and offered her necklace and ring in payment of Padgett's debt – but the offer was refused. Long then drove Nancy Sheppard to her home. Parker (armed with a pistol), Groover, Elaine and Richard Padgett set off in the Parker car in a desperate, but unsuccessful, effort by Padgett to collect money with which to pay the drug debt. Then Padgett was taken to the junkyard of Parker's father – where Groover and Padgett engaged in a fist fight. Parker, Groover and Elaine then drove Padgett to a deserted area in the Yellow Water section of Duval County. The three men exited the car and Padgett fell to his knees and begged mercy. Groover shot Padgett to death as Parker aided and abetted the murder. The two men then dumped Padgett's body in a water-filled ditch. Thus was Murder #1 committed.

Then Parker, Groover and Elaine returned to the junkyard where they melted down the gun, looked for blood on their clothes, cleansed themselves and went to a bar.

At the bar they met Jody Dalton, 21, with whom Groover had previously had an intimate relationship. Ms. Dalton unwisely decided to accompany them – whereupon Parker, Groover, Elaine and Ms. Dalton left the bar and drove to a secluded area where the melted gun was tossed into the river. Unfortunately, for her, Ms. Dalton witnessed the gun disposal. All four then drove to the Parker home where they left Ms. Dalton at approximately 2:00 a.m. Then Parker, Groover and Elaine drove to the residence of Joan Bennett and invited her to pay a social visit to the

Parker abode. Ms. Bennett, having nothing better to do at that early hour, accompanied them.

Upon their return Parker was outraged to find that Ms. Dalton had partaken of some of his drugs in the trailer home. After a heated discussion, some rope and concrete blocks were taken from the Parker property and placed into the car – and Ms. Dalton was invited to a night-time outing at a secluded and isolated area known as Donut Lake.

As Parker, Groover, Elaine, Ms. Dalton and Ms. Bennett drove to the Lake, Ms. Dalton performed fellatio upon Groover. After this romantic interlude, Ms. Bennett overheard Parker and Groover discuss "getting rid" of Ms. Dalton.

At the Lake Ms. Dalton was stripped of her clothes, taunted, kicked and beaten as she begged for mercy then Groover shot her to death as Parker aided and abetted the murder. The two men tied up the body with the rope and concrete blocks and sunk her into the Lake. Thus was Murder #2 committed.

On the trip back to the Parker manse, Parker and Groover discussed killing Ms. Bennett because she had witnessed the Dalton Murder. However, Elaine assured them of Ms. Bennett's discretion and trustworthiness – which assuaged their fears and they drove Ms. Bennett home. Then, Parker, Groover and Elaine concluded that Nancy Sheppard would link them with Padgett's death and therefore she too had to die. The three then proceeded to the home of Long so that he could direct them to Nancy's residence. Long, who had just returned home from a

nightlong tryst with a ladyfriend, did not wish to accompany the trio – but finally agreed because only he knew the, location of Nancy's home. Long, who was unaware of their plan to murder the girl, got into the car and gave, directions – and at length they arrived at the Sheppard residence.

At the urging of Parker and Groover, Elaine went into the house and tricked Nancy into the car by telling her they would take her to visit Richard Padgett. As Parker, Groover, Elaine, Long and Nancy rode in the car, Parker told Nancy that "Richard is out in the woods wandering around high, wants to see you".

At one point the car stopped and Parker ordered Long out of the car. Parker, Groover and Long walked a distance from the car and Parker asked Long if he knew what was going on – to which Long replied, no. Then Parker and Groover chortled gleefully and said, "Well, you will in a few minutes".

They got back into the car and continued a short distance when the car stopped again and Parker ordered Long out. Parker led Long to the ditch and showed him Padgett's dead body. Then Parker said "You know what's going on now?" Long replied "No, I sure don't."

Parker then told Long either you kill Nancy or I will kill you. Long, who had been shot by Parker in 1980, (see criminal record and explanation, page 9 & 10 herein) had good reason to fear Parker's violence and took him at his word.

Parker led the innocent and unsuspecting young Nancy to the ditch where she saw Padgett's body, fell to her knees and screamed "Oh, my God."

Elaine then handed Long a pistol and said "You better do it or he'll kill you too." Long shot Nancy in the head and as Parker and Groover screamed "shoot her again, she's still breathing", he shot her twice more.

Parker grabbed the dead or dying girl's head in one hand and cut her throat with a knife and then took her necklace and ring.

After they returned to the car Parker said to Long, "Now, you're in it with us, you're in it with us". Then he volunteered to give Long some drugs. Thus was Murder #3 committed.

All three murders were brutal, senseless and savage, but the shooting and throat-cutting and robbery of the helpless 17-year old girl was so heartless and atrocious as to indicate a murderer without conscience or pity.

4. CRIMINAL RECORD

The Sheriff's Office records and the PSI show the defendant's adult criminal record as follows:

"ADULT:

PLACE	DATE	CHARGE	DISPOSITION
Jax, FL	8/10/73	Breach of Peace	Nolle Prossed
		Disorderly Intoxication	Nolle Prossed
		Discharging Firearm	Nolle Prossed
		Unnecessary Noise	$10.00 fine
Jax, FL	5/18/74	Burglary	Fined $101.00
		Assault	
Jax, FL	4/12/75	Trespass	Dropped
		Resisting Arrest Without Violence	$50.00 fine
Jax, FL	7/15/76	Possession of Controlled Substance	Dropped
Jax, FL	11/6/75	Disorderly Intoxication	$25.00 plus $2.00 fine
		Public Profanity	Nolle Prossed
Jax, FL	10/21/79	Discharging Firearm	Dropped
		Disorderly Intoxication	$25.00 plus $2.00 fine

JAX, FL**	2/23/80	AGGRAVATED BATTERY	1 YEAR DUVAL COUNTY JAIL AFTER SERVING 6 MONTHS, PLACED ON 1 YEAR PROBATION
		POSSESSION OF FIREARM	DROPPED
Jax, FL	11/2/80	Careless Driving	Discharged
		Driving While Intoxicated	Nolle Prossed
Jax, FL	6/30/81	Disorderly Intoxication	$25.00 plus $4.25 fine
		Opposing a Police Officer	$25.00 plus $14.25 fine
Jax, FL	8/20/81	Disorderly Intoxication	$175.00 plus $10.00 fine $8.75 fine
Jax, FL	1/24/82	Reckless Driving	60 days N.P.T.
Jax, FL	1/24/82	Breach of Peace	60 days N.P.T.
		Resisting Arrest with Violence	Nolle Prossed
		Assault on Law Enforcement Officer	Nolle Prossed
Jax, FL	2/11/82	Murder 1st Degree (3 counts)	Instant Offense"

** The supplement to the PSI shows that the victim of the aggravated assault was William Long – who was shot by Parker, as follows:

"According to the Jacksonville Sheriff's Office report dated February 23, 1980, the subject along with Frank Douglas Bradley entered the residence at 7806 Lennox Avenue where William Long was a dinner guest. William Long and David McDonald became involved in a discussion with Robert Parker and Frank Bradley. Robert Parker wanted Long and McDonald to help him and Bradley to do bodily harm to another individual. When Long and McDonald refused to cooperate, Parker became upset and an argument developed. Parker then slapped Long on the face and then shot Long in the left shoulder. Both Parker and Bradley then fled in Parker's vehicle. Officers Adams, French and Phillips observed Parker's vehicle northbound on Parrish Cemetery Road. The listed officers stopped the vehicle in the 10,000 block of Normandy Boulevard and both Parker and Bradley were apprehended by these officers. This time the subjects were advised of their rights and transported to the Duval County Jail."

5. COMMENT OF COURT

These three murders establish a landmark of sorts. They are the first convictions of wholesale slaughter in this circuit as a consequence of an illegal drug operation.

Tommy Groover, who was charged with Parker in these three murders, was tried first and convicted on January 8, 1983. He was the first defendant to be convicted of three first degree murders in this circuit since the re-enactment of the capital punishment law, and before that for such a long period of time that memory fails to reveal a similar triple first degree conviction.

This historical fact is significant because these murders are a direct result of the drug culture which has spread over this state and nation like an evil plague.

Crime had advanced to another plateau with the coming of the drug plague. Homicides are more wanton, vicious and numerous – it is slaughter on a grand scale.

These murders and the sentences imposed on this convicted murderer should be a horrifying and stunning reminder of the monumental stupidity of using and dealing in illegal drugs.

With the exception of Nancy Lee Sheppard – all of the victims and defendants were either drug dealers or users, and young Nancy was murdered because of her association with them.

This lesson must be learned: illegal drug use is a certain path to moral, physical and emotional ruin and possible death – not only to those who use drugs but also to those who associate with them.

6. ALL EVIDENCE CONSIDERED BY COURT

Before imposing sentence, this Court has carefully studied and considered all the evidence and testimony at trial and at advisory sentence proceedings, the presentence Investigation Report, the applicable Florida Statutes, the case law, and all other factors touching upon this case.

The following is a summarization and analyzation of each of the statutory aggravating and mitigating circumstances – in reverse order.

7. SUMMARIZATION OF STATUTORY MITIGATING CIRCUMSTANCES (F.S. 921.141(6))

A. THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

As an adult the defendant has been arrested 13 times and has been charged with 26 separate crimes. He has been convicted of 10 misdemeanors and one felony.

FACT:

The defendant's felony conviction is for his shooting of William Long in 1980. William Long is the person who shot Nancy Sheppard after the defendant threatened to kill him if he did not shoot her.

CONCLUSION:

This is not a mitigating circumstance under this paragraph because the defendant does have a significant history of prior criminal activity.

B. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

FACT:

The defense attorney did have defendant examined under Rule 3.216(A) (EXPERT TO ASSIST COUNSEL IN PREPARING DEFENSE). Dr. James Larson, a psychiatrist, was appointed and did examine the defendant and gave his confidential report to defense counsel.

The defense did not file a defense of insanity, Dr. Larson did not testify for defendant at trial,

nor did any expert or lay person testify that defendant was under the influence of extreme mental or emotional disturbance at the time of the three murders.

FACT:

The defendant testified in his own behalf and while he blamed others for the murders, he did not claim mental or emotional disturbance at the time of the crimes.

FACT:

The testimony and evidence at trial was that defendant was running a drug operation and that the three murders were the direct consequence of his efforts to collect drug debts. The sequence of murders and the scenario of each were orchestrated by the defendant who was in full control of his faculties without extreme mental or emotional disturbance.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

C. THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:

Neither Nancy Sheppard, Richard Padgett or Jody Dalton were in any way participants in defendant's conduct. Each of the victims had either been tricked, lured or kidnapped to the place of murder.

Both Padgett and Dalton had begged and pleaded for their lives and Sheppard was shot in the back of the head as she knelt over Padgett's dead body.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

D. THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The evidence showed that this defendant was the ringleader of a drug operation and that the homicidal events started when defendant made threats of death to enforce payment of drug debts. His participation was major in every sense as shown by evidence at trial – as follows:

A. Defendant, Groover and others met at defendant's house to plan strategy.

B. Groover took Richard Padgett to defendant's house in effort to collect money for defendant.

C. The homicidal rampage started out from defendant's house.

D. The murderers returned to defendant's house after each murder.

E. Defendant's pistols were used in the three murders.

F. Defendant threatened to kill Groover if he did not get drug money.

G. Defendant threatened and intimidated others but was himself never threatened.

H. Defendant was the person to whom drug debts would be paid when collected.

I. Defendant was the person who was angry with Jody Dalton because she used his drugs without his permission.

J. The rope and concrete blocks used to tie and weight Jody's body were taken from defendant's property.

K. Before Richard Padgett was murdered, he was taken to defendant's father's junkyard and beaten.

L. After the Padgett murder, defendant and Groover returned to defendant's father's junkyard to melt down the gun.

M. Defendant was so secure in his own safety and so in control of events that he took his former wife along on all three murders.

N. Defendant's former wife lured Nancy Sheppard out of her home to be murdered.

O. Defendant's car was used throughout the murders.

P. Defendant was present aiding, abetting, encouraging and directing all three murders.

Q. Defendant threatened to kill William Long if he didn't shoot Nancy Sheppard.

R. Defendant cut Nancy Sheppard's throat and took her ring and necklace.

FACT:

The defendant's participation was major and predominant in all three of the murders.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

E. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

The defendant claimed that he acted under extreme duress and that he was in fear of Groover – but other than his own testimony – the evidence was to the contrary. Witnesses stated that defendant and Groover were friends of long standing and that Groover sold drugs for defendant. This defendant is the person who had guns and was armed most of the time and he is the person who repeatedly threatened to kill Groover.

Witnesses testified that this defendant is the person they feared because of his propensity for violence, because he had shot Long in the past, and because he was always armed.

The evidence at trial refutes defendant's contention of duress and/or dominance of Groover or any other person.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

F. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

Never, at any time, was it contended that the defendant was insane or incompetent at the time

of the crime or at trial – nor was there any evidence or testimony that he was substantially impaired in his ability to appreciate the criminality of his conduct or to conform it to the requirements of the law.

FACT:

The defendant not only appreciated the criminality of his conduct – but acting on that appreciation, he murdered two other persons to prevent disclosure of the first murder.

FACT:

The defendant melted the murder gun, burned physical evidence, murdered Nancy Sheppard so she could not link him to the Padgett murder, and murdered Jody Dalton because she had seen the disposal of the murder weapon – all of which clearly shows the defendant appreciated the criminality of his conduct.

Although the defendant was examined by his private psychiatrist, there was no testimony or evidence that his ability to conform his conduct to the requirements of the law was substantially or even slightly impaired.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

G. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

FACT:

The defendant was 28 years old at the time he murdered 17-year old Nancy Sheppard, 21-year old Jody Dalton, and 23-year old Richard Padgett.

FACT:

The defendant's chronological age was 28 years at the time of the murders. However, in life experience and maturity he was much older.

FACT:

He had married at age 16; had fathered two children; had divorced, remarried and divorced again.

FACT:

The defendant had been on his own since the age of 16 when he married. He had worked 9 years as a car paint and body man, as a hospital orderly and was an admitted drug dealer.

FACT:

The defendant had been arrested 13 times, had been convicted of 10 misdemeanors and one felony and had served a number of jail terms.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

7. SUMMARIZATION OF STATUTORY AGGRAVATING CIRCUMSTANCES (F.S. 921.141(5))

A. THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

FACT:

This does not apply to the present case.

CONCLUSION:

There is no aggravating circumstance under this paragraph.

B. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

FACT:

On February 23, 1980, the defendant was convicted of Aggravated Battery for shooting William Long (see criminal record Pages 9 & 10 herein). This is, of course, a conviction of a felony involving the use of violence to a person.

FACT:

In the present case the defendant was convicted on March 9, 1983, of the first degree murder of Richard Padgett and Nancy Sheppard and the third degree murder of Jody Dalton. Thus, defendant has been convicted of two capital crimes and one felony involving the use of violence to a person. Although the convictions were obtained on the same day – they are separate and not fused. Therefore, each is an aggravating circumstance to the first degree murders. (*Elledge v. State*, 348 So.2d 998 and *King v. State*, 390 So.2d 315)

CONCLUSION:

There is an aggravating circumstance, under this paragraph as to the Padgett and Sheppard murders for the reason that defendant has been previously convicted of another capital felony – and has been convicted of two other felonies involving violence to a person.

C. THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:

The defendant was present, aiding and abetting the murders of Richard Padgett and Jody Dalton

and he forced William Long to shoot Nancy Sheppard. By participating in those murders and by making threats to kill Long and Joan Bennett – he has murdered three people and placed two others in great risk of death.

CONCLUSION:

It cannot be said with certainty that he created a great risk of death to "many" persons – because the exact legal meaning of that term is not known. Therefore, this is not an aggravating circumstance.

D. THE CAPITAL FELONY WAS COMMITTED WHILE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING, OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

FACT:

The defendant took Richard Padgett to a junkyard where he, was beaten and threatened with a gun, and then to a deserted area where he was murdered.

Padgett was forcibly – and by the use of threats – secretly confined, and abducted by defendant against his will and without lawful authority – with the intent to inflict bodily harm upon him or to terrorize him – or to commit the felony of murder upon him.

The actions of defendant in kidnapping and abducting Padgett come squarely within the

definition of kidnapping as set forth in Florida Statute 787.01.

FACT:

The defendant tricked Nancy Sheppard out of her home into a wooded area where she was murdered and robbed of her necklace and ring by the defendant.

The capital felony of murder was committed in the course of the robbery and this crime comes within the definition of this aggravating circumstance.

CONCLUSION:

There is an aggravating circumstance for the reason that defendant committed murders while he was engaged in the kidnapping of Richard Padgett and the robbery of Nancy Sheppard.

E. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

FACT:

The murder of Nancy Sheppard was to prevent her from linking the defendant with the murder of her boyfriend, Richard Padgett – and thus to prevent and/or avoid the defendant's lawful arrest for that murder.

CONCLUSION:

There is an aggravating circumstance under this paragraph in the Sheppard Murder.

F. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

FACT:

All three murders were committed as the result of the stated intent of the drug dealer-defendant to kill if he did not collect money owed him for drugs.

FACT:

The defendant threatened and forced William Long to shoot Nancy Sheppard – and then defendant cut her throat and took her ring and necklace.

CONCLUSION:

There is an aggravating circumstance under this paragraph as to the, Sheppard and Padgett murders.

H. THE CAPITAL CRIME WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

FACT:

The defendant abducted and kidnapped Richard Padgett. He was present, aiding and abetting as Padgett was beaten and shot to death while on his knees begging for mercy.

FACT:

The events of that fateful evening lasted for hours as Padgett desperately tried to save his own life. He endured threats with a loaded pistol, physical beating and abuse, and went through tortuous hours before he was finally shot in the head by the defendant.

During the agonizing hours of his abduction, Padgett knew his fate was sealed – and was

especially aware of it as he was driven to his place of execution; so certain was he, that he fell to his knees and begged for mercy. His terror was magnified as a pistol was pointed at his head and snapped three or four times before it finally fired.

The defendant and Groover toyed with their victim for hours – as a cat with a mouse. The severe and continuous emotional strain of Padgett was cruel, heinous and atrocious in the extreme.

FACT:

Nancy Sheppard had just turned 17 the day before she was murdered. The defendant lured her out of her home and away from her family on the pretense of taking her to her boyfriend, Richard Padgett.

Once they arrived at the, murder scene, the defendant led the, innocent young girl to the water-filled ditch and showed her the dead body of Richard Padgett. She fell to her knees and sobbed, "Oh, my God". The defendant then ordered William Long to shoot Nancy or himself be killed. As Nancy kneeled over Padgett's body, Long shot her. The defendant screamed "shoot her again, shoot her again". Then the defendant grabbed the young girl's head and cut her throat – after which he took her ring and necklace.

The severe emotional strain upon such a child of tender years as she knelt frightened and helpless over the dead body of her boyfriend must have been excruciating.

CONCLUSION:

If the murders of Nancy Sheppard and Richard Padgett – under such excruciating circumstances – were not especially heinous, atrocious and

cruel, then new meaning must be given to those terms which transcend the present understanding of them. This is an aggravating circumstance in the Sheppard and Padgett murders.

I. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

FACT:

The defendant took Richard Padgett to a junkyard where he was beaten, threatened with a pistol, abducted and taken to a deserted road in the woods where he was executed while on his knees begging for mercy. The execution of Padgett was cold, calculated and premeditated in every sense. The only reason for this murder was the non-payment of a drug debt – which is certainly not moral or legal justification.

FACT:

Young Nancy Sheppard was lured from her home by the defendant and taken to the woods and shot. The defendant then cut her throat and robbed her of her jewelry. She was murdered to prevent her from incriminating the defendant. There is no moral or legal justification for this cold, calculated, premeditated and pitiless murder.

CONCLUSION:

There is an aggravating circumstance under this paragraph as to both the Sheppard and Padgett murders.

9. FINDINGS OF THE COURT

A. There are one or more aggravating circumstances in the first count (Padgett murder) and the second count (Sheppard murder) which have been established beyond a reasonable doubt.

B. There are no mitigating circumstances that outweigh the aggravating circumstances in the first count (Padgett murder) and the second count (Sheppard murder).

C. That the appropriate sentence of the defendant in the second count is death.

D. That the appropriate sentence in the first count is life imprisonment without the possibility of parole for 25 years.

E. The maximum sentence for the third degree murder of Dalton (third count) is 15 years' imprisonment. Such maximum sentence is an appropriate sentence in the third count.

10. AUTHORITY FOR SENTENCE

That under Florida law the Judge sentences a defendant convicted of Murder in the First Degree either to death or life imprisonment. This is an awesome burden to be placed upon the Judge – but the landmark Florida case *State v. Dixon*, 283 So.2d 1, the Florida Supreme Court said that when such discretion can "be shown to be reasonable and controlled, rather than capricious and discriminatory, then it meets the test of *Furman v. Georgia*, 408 U.S. 238".

That the case of *Tedder v. State*, 332 So.2d 908, sets this test:

> "In order to sustain a sentence of death following the jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

It is suggested that the facts and circumstances show that this test has been fully met.

10. SENTENCE

You, ROBERT L. PARKER, having been found guilty of murder in the first degree on the First and Second Counts and third degree murder on the Third Count - I hereby adjudge you to be guilty on each count. It is the Judgment and Sentence of the Court as follows:

1. On the Second Count, I sentence you to death. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set. That on such date you be put to death by having electrical currents passed through your body in such amounts and frequency until you are rendered dead.

2. On the First Count, I sentence you to life imprisonment without the possibility of parole for twenty-five years. I order that you be taken by the proper authorities to the Florida State prison and there to serve such term.

3. On the Third Count, I sentence you to the maximum term of 15 years' imprisonment. I order that you be taken by the proper authorities to the Florida State Prison and there serve such term.

4. The sentence in the First Count shall run consecutively to the sentence in the Second Count. The sentence in the Third Count shall run consecutively to the sentences in the First and Second Counts.

I advise you that you have thirty (30) days from this date in which to take an appeal. Should you fail to take an appeal within 30 days, then you waive, forfeit and give up such right of appeal.

The Office of the Public Defender is hereby appointed to represent you on any such appeal.

May God have mercy upon your soul.

DONE AND ORDERED AND SENTENCED in Open Court, at the Duval County Courthouse, Jacksonville, Florida, on April 29, 1983.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF,
CIRCUIT JUDGE

Copies:

Honorable T. Edward Austin
Ralph N. Greene, II, Esquire
Robert J. Link, Esquire

Supreme Court of Florida.

Robert Lacey PARKER, Appellant,

v.

STATE of Florida, Appellee.

No. 63700

Sept. 6, 1984.

Rehearing Denied Dec. 3, 1984.

PER CURIAM.

Appellant was tried on three counts of first-degree murder. A jury found him guilty of first-degree murder on two counts and of third-degree murder on the other and recommended a sentence of life on each of the first-degree murder convictions. The trial judge overrode the jury recommendation on one of the convictions and imposed the death penalty. We have jurisdiction to review the convictions and the imposition of the death penalty pursuant to article V, section 3(b)(1), Florida Constitution. We affirm both the convictions and the sentence.

Parker was charged with first-degree murder in the deaths of Richard Padgett, Jody Dalton and Nancy Sheppard. The state introduced evidence at trial that Parker was a drug dealer and Tommy Groover sold drugs for him. Groover had allegedly fronted some drugs to Padgett. When Groover was unable to pay Parker, Parker allegedly threatened to hang Groover unless the debt was satisfied. Testimony indicated Parker was of a violent temperament, had possession of firearms and was irritated over the drug debt. Uncontroverted evidence

showed that Padgett was located at a bar, taken to Parker's junkyard and beaten by Groover and driven into the woods and shot by Groover. Later that same evening, Groover beat and shot Jody Dalton and Parker helped weight her body and sink it in a lake. Finally, Nancy Sheppard, Padgett's seventeen-year-old girlfriend, was lured from her home and taken to the ditch where Padgett's body had been left. She was killed by Billy Long, who testified that he was ordered to kill her by Parker, who threatened to kill him in her place unless Long complied. Parker then took Sheppard's necklace and ring from her body.

Parker did not deny being present during these events, but he testified in his own behalf that he had been an unwilling accomplice, forced into cooperation by Groover's threats against Parker's family. He further claimed to have had no indication that Groover planned to kill Padgett or Dalton and that these murders were not part of any common scheme or in furtherance of any common goal. On the contrary, Parker claimed friendship with Padgett and disclaimed more than the slightest acquaintance with either of the women.

The jury convicted Parker of third-degree murder in the death of Jody Dalton and first-degree murder in the Padgett and Sheppard homicides. The jury recommended life imprisonment on both first-degree convictions. The trial judge sentenced Parker to life in the Padgett killing, but he imposed the death penalty for the Sheppard murder.

Appellant raises twenty issues as assignments of error in the guilt phase. All have been considered in

depth and found insufficient to require reversal. We find it necessary to discuss only three at any length.

First, Parker contends that the Padgett murder was an independent act of Tommy Groover's, and the trial court erred in denying Parker's request for a jury instruction on the independent act of a co-felon, citing *Bryant v. State*, 412 So.2d 347 (Fla.1982). It is true that an act in which a defendant does not participate and which is "outside of and foreign to, the common design" of the original felonious collaboration may not be used to implicate the nonparticipant in the act. 412 So.2d at 349. Where any evidence which would support the theory of independent act has been presented, the defendant is entitled to the jury instruction. We do not find any evidence on the record which would require the instruction.

In *Bryant*, the defendant had agreed to help burgle a supposedly empty apartment. Upon entering the apartment, the defendant discovered the victim to be present – bound hand and foot, naked on the floor. The defendant admitted to retying the victim and moving him to the bed, but he testified that when he left the apartment fifteen minutes later the victim was alive and had not been sexually assaulted. The victim's dead body was later discovered; he had been violently assaulted anally and strangled with a necktie.

Bryant is clearly distinguishable from the present case even when all the evidence presented is viewed in the light most favorable to Parker. In *Bryant* the defendant did not participate in creating the circumstances which directly let to the victim's death. Parker, on the other hand, created the initial situation by threatening to

kill Groover if he did not reimburse Parker for drugs he had fronted to Padgett. In *Bryant*, the defendant claimed to have withdrawn entirely from the scene and to have fulfilled his role in the criminal enterprise before the rape and murder began. Parker was on the scene and was still demanding repayment when Padgett was murdered. Finally, the acts of rape and murder are not inspired by the same criminal motivation which induced Bryant's participation in a burglary for pecuniary gain. Parker, however, was, at the very least, aware that Padgett was being driven to the woods against his will as part of the ongoing terrorization for failure to pay his drug debt and to keep him from seeking reinforcements from his relatives and mounting a retributive attack on Groover and Parker. The murder was a natural and foreseeable culmination of the motivations for the original kidnapping. As a principal to the kidnapping, Parker is a perpetrator of the underlying felony and thus a principal in the homicide. *Goodwin v. State*, 405 So.2d 170 (Fla.1981). We find no error in the failure to give the requested instruction.

Of more concern is the state's advising the jury that Elaine Parker, appellant's ex-wife and a participant in the sequence of events giving rise to the murders, had pleaded guilty to one count of second-degree murder pursuant to a plea bargain. Appellant cites *Thomas v. State*, 202 So.2d 883 (Fla. 3d DCA 1967), and *Moore v. State*, 186 So.2d 56 (Fla. 3d DCA 1966), as holding that revealing a co-felon's conviction or entry of a guilty plea was impermissibly prejudicial to the fairness of the trial. We agree in principle with Judge Pearson's analysis in *Thomas*:

> As a general rule, it is improper for a prosecuting attorney to disclose during trial that another defendant had been convicted or has pleaded guilty. This is because competent and satisfactory evidence against one person charged with an offense is not necessarily so against another person charged with the same offense. Each person charged with the commission of an offense must be tried upon evidence legally tending to show his guilt or innocence.

202 So.2d at 884.

Nonetheless, while we find the revelation of Elaine's plea to be error, on the unique facts of this case we must find that error to be harmless. First, it cannot be fairly argued that placing Elaine's plea before the jury foreclosed any viable option Robert had of denying involvement. The state had assembled too many eyewitnesses to Parker's presence during and participation in the sequence of events in which the murders occurred for him to offer a defense of non-participation. Rather, he admitted his presence during and participation in all but the physical act of murder, but he defended his actions on a theory of an independent act of a co-felon in the Padgett murder and a theory of duress in the Dalton and Shepard (sic) killings. Both theories of defense rely on Parker's own subjective perceptions of the events and on his personal formulation of intent. Elaine's plea of guilty could not be construed as rebutting any portion of Robert's defense inasmuch as her perceptions and formulation of intent could not be imputed to him, nor his to her. Thus, Robert's defense was not fundamentally prejudiced because the jury knew Elaine had entered a guilty plea to a charge of second degree murder. Additionally, the trial judge included in the jury instructions a curative

admonition that a co-felon's plea should not be considered as relevant to the issue of defendant's guilt.

Finally, we must address the state's use of a police investigator to testify to a witness's reputation in the community for truth and veracity. The defense attorney argued strenuously at trial against the admission of this testimony, citing *Stripling v. State*, 349 So.2d 187 (Fla. 3d DCA 1977), *cert. denied*, 359 So.2d 1220 (Fla.1978), for the proposition that a police investigator may not be used as a witness to reputation in the community. The state countered with the argument, accepted by the trial judge, that the subject had no fixed community of residence but that he had been extensively involved with the criminal justice system and had spent the previous year in Duval County Jail. Thus, the state reasoned, the subject's "community" was the criminal justice system and the police officer, as part of that system, was a member of the community for purposes of testifying about the subject's reputation for truth and veracity. We find this construction of the rules of evidence novel but unacceptable. It has long been accepted that in the absence of sufficient contact with a community of residence to establish a reputation for truth and veracity, evidence of that reputation in another social context will be admissible. *Hamilton v. State*, 129 Fla. 219, 176 So. 89 (1937). However, we do not agree that the criminal justice system is either neutral enough or generalized enough to be classed as a community or that an officer in that system is equipped to provide an unbiased and reliable evaluation of an inmate's general reputation for truth-telling. Nonetheless, the witness whose testimony was attacked was only material to the defense case insofar as he accused Long of

lying about Parker's *active* involvement in the Sheppard murder and his credibility was subject to impeachment on his record. In light of the totality of the evidence presented both by Long and by Parker himself, we find this error to be harmless.

In addition to considering all other issues raised on appeal, we have conducted an independent review of the record on trial and find no reason to award a new trial. Accordingly, the convictions are affirmed.

In sentencing Parker to death for the Sheppard murder in spite of the jury's recommendation of life, the trial judge found that Parker had been previously convicted of another violent felony, the murder was committed during a robbery, the murder was committed to avoid lawful arrest, the murder was committed for pecuniary gain, the murder was especially heinous, atrocious and cruel, the murder was cold, calculated and premeditated. We cannot accept the findings that the murder was committed during the robbery or that it was especially heinous, atrocious or cruel. Although Parker admitted taking the victim's necklace and ring from her body after her death, the evidence fails to show beyond a reasonable doubt that the murder was motivated by any desire for these objects. The motive expressed at the time of the killing was to keep the victim from implicating the murders in the death of Richard Padgett. Nancy Sheppard had offered the jewelry to Parker the evening before she was killed as payment for Padgett's debt. Parker refused it at that time and there is no indication that taking it after her death was more than an afterthought, rather than a motive for murder. This evidence does not satisfy the standard of proof beyond a reasonable doubt on which the finding of

an aggravating factor must be based. *Williams v. State*, 386 So.2d 538 (Fla.1980).

We note in passing that the finding that the murder was for pecuniary gain was not based on the taking of the jewelry. Rather, the trial court stated that the entire sequence of events in which the murders occurred was touched off by Parker's desire to establish a remunerative drug-dealing network and his need to establish a reputation as a collector of debts. The evidence amply supports this finding and we accept it.

We find the same lack of proof in the determination that the murder was especially heinous, atrocious and cruel. Evidence showed that Sheppard left her home willingly, expecting to meet her boyfriend, Padgett, in the woods. Her first indication that something was amiss came when she saw his body in the ditch. She fell to her knees, covered her face with her hands and cried out. Almost immediately she was shot and killed, execution style. There was nothing unusual in the manner or method of effecting the crime. We do not gainsay the pathos surrounding the murder of this young girl. However, this aggravating factor cannot properly be considered.

The trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied. In light of these findings the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. *Tedder v. State*, 322 So.2d 908 (Fla.1975). The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty

has been found appropriate. *Spaziano v. Florida*, ___ U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Accordingly, the sentence of death is affirmed.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, EHRLICH and SHAW, JJ:, concur.

ADKINS, J., concurs in the convictions, but concurs in the result only of the sentence.

McDONALD, J., concurs in the convictions, but dissents from the sentence.

IN THE SUPREME COURT OF FLORIDA

ROBERT LACY PARKER, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO.: 63,700

MOTION FOR REHEARING

The Appellant, by and through his undersigned attorney, respectfully moves this Honorable Court for rehearing on the issues presented in this cause, pursuant to Fla. R. App. P. 9.330, and asserts the following grounds in support of his motion:

I

The affirmance of the defendant's death sentence in the Sheppard murder is a complete departure from previous decisions of this Court in jury over-ride cases. For this Court to apply the *Tedder* standard [*Tedder v. State*, 322 So.2d 908 (Fla. 1975)] to the instant case and to affirm the death sentence would be to adopt such a broad and vague construction of the *Tedder* standard as to violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See *Godfrey v. Georgia*, 100 S. Ct. 1759 (1980).

Prior to the opinion written in this case, this Court described the standard of appellate review in jury over-ride cases as follows:

> We have repeatedly stated that in reviewing the propriety of a death sentence, this Court must weigh heavily the advisory opinion of life imprisonment by the sentencing jury. The facts justifying the death sentence must be clear and convincing in order to overrule the jury's recommendations. (Citations omitted) Therefore, we must examine this record to determine whether there are clear and convincing facts that warranted the imposition of the death penalty, and, on doing so, we must determine if there was a reasonable basis for the jury's recommendation. *Malloy v. State*, 382 So.2d 1190, 1193 (Fla. 1979).

In past decisions, this Court has analyzed the record to determine what factors could have influenced the jury to return a jury life recommendation. See *Welty v. State*, 402 So.2d 1159, 1164 (Fla. 1981); *Barfield v. State*, 402 So.2d 377, 382 (Fla. 1981). In the instant opinion, there is no mention whatsoever of the numerous statutory and non-statutory mitigating circumstances that were presented by the defendant at the trial level, yet virtually every mitigating circumstance presented by the defense has been previously recognized by this Court as a reasonable basis for a jury life recommendation.

In *Malloy*, supra, this Court reversed two death sentences for two execution-style murders, stating:

> We find that the jury's action was reasonable because of the conflict in the testimony as to who was actually the triggerman and because of the plea bargains between the accomplices and the State.
>
> From the evidence presented, the jury could have believed the appellant's story that he was not the triggerman and still have convicted him of first degree murder. *Id.* 1193.

Just as in *Malloy*, there was substantial conflict in the testimony as to the relative culpability of the four co-defendants involved in the Sheppard murder. The evidence moreover was undisputed that the defendant Robert Parker was *not* the triggerman. Just as in *Malloy*, the jury could have believed the defendant's testimony and still convicted him of first degree murder. In fact, the prosecution argued this theory to the jury. (T. 2147-2149, 2264). Just as in *Malloy*, the sentences of the co-defendants could have formed a reasonable basis for the jury life recommendation. In fact, the defense introduced evidence of the disposition of the co-defendant's cases and argued it as mitigation. (T. 2366, 2378, 2491-2496). Co-defendant Groover received a life sentence for first degree murder after trial, co-defendant Elaine Parker made a plea bargain to second degree murder; co-defendant Billy Long made a plea bargain to second degree murder. Where the triggerman and the one who lured the victim out of her home to be murdered were both given plea bargains to second degree murder, the jury life recommendation for the defendant can hardly be called unreasonable. *Slater v. State*, 316 So.2d 539 (Fla. 1975); *Taylor v. State*, 294 So. 2d 648 (Fla. 1974); *Hawkins v. State*, 436 So.2d 44 (Fla. 1983); *Barfield v. State*, 402 So.2d 377 (Fla. 1981).

In *Jacobs v. State*, 396 So.2d 713 (Fla. 1981), the fact that the defendant was the mother of two young children for whom she cared was found by this Court to form a reasonable basis for the jury's recommendation of life. Here, the defendant presented evidence that he was the father of two young children for whom he care (T. 2490-2491.

In *Goodwin v. State*, 405 So.2d 170 (Fla. 1981), this Court found that duress not amounting to a defense to the crime was a reasonable basis for a jury's life recommendation in a case involving three first degree murders. Duress was Robert Parker's defense to the Sheppard murder, but the trial court specifically instructed the jury that they could not consider it in the guilt phase. Duress, then, was a statutory mitigating circumstance that could very well have been found by the jury.

It was undisputed that Robert Parker was under the influence of alcohol and drugs at the time these murders were committed. This Court has repeatedly held that such intoxication is a reasonable basis for a life recommendation. *Kampff v. State*, 371 So.2d 1007 (Fla. 1979); *Buckrem v. State*, 355 So.2d 111 (Fla. 1978); *Norris v. State*, 429 So.2d 688 (Fla. 1983).

The defense presented the testimony of six witnesses regarding his troubled childhood; alcoholic, wife-beating father; the influence of Elaine Parker in involving the defendant with drugs; the defendant's relationship with his children; and actions of the defendant's reflecting concern and compassion for others. Such background and character evidence has been repeatedly held by this Court to be a reasonable basis for a life recommendation. *McCampbell v. State*, 421 So.2d 1072 (Fla. 1982); *Washington v. State*, 432 So.2d 44 (Fla. 1983); *Neary v. State*, 384 So.2d 881 (Fla. 1980).

The fact that the trial court judge found four valid aggravating circumstances and no mitigating circumstances hardly answers the question of whether there was a reasonable basis for the jury life recommendation, nor

does it compel the affirmance of a death sentence. In *Hawkins*, supra, the trial judge found five valid A.C.'s, and no mitigating circumstances but this Court reversed for a life sentence. In *Richardson* v. State, 437 So.2d 1087 (Fla. 1983), the trial judge found four valid aggravating circumstances and no mitigating circumstances; again this Court reversed for a life sentence.

In *Neary*, supra, the trial court found four valid aggravating circumstances and no mitigating circumstances, but this Court order a life sentence. In *Welty*, supra, the trial court found four valid aggravating circumstances and no mitigating circumstances, but this Court again remanded for imposition of a life sentence. In numerous other cases, the trial court judge found no mitigating circumstances and valid aggravating circumstances, but this Court ordered the imposition of a life sentence because a review of the record indicated a reasonable basis for the jury life recommendation: *Taylor* v. State, 294 So.2d 648 (Fla. 1974); *Barfield v. State*, 402 So.2d 377 (Fla. 1981); *Williams v. State*, 386 So.2d 538 (Fla. 1980); *Gilvin v. State*, 418 So. 2d 996 (Fla. 1982); *Provence v. State*, 337 So.2d 783 (Fla. 1976); *McCampbell v. State*, 421 So.2d 1072 (Fla. 1982); *Harvey v. State*, 439 So.2d 1372 (Fla. 1983).

In determining whether there is a reasonable basis for the jury life recommendation, this Court has, in its opinion in this cause, limited its scope of review to the sentencing order of the trial judge. This practice is clearly inconsistent with previous decisions of this Court, (See cases cited above.), and can only result in rubber-stamp approval of jury over-rides if it is to continue. The United

States Supreme Court has frequently cited the *Tedder* standard as an important check on arbitrary, capricious, unreliable, and disproportionate capital sentencing. To approve the death sentence in this cause pays but lip service to *Tedder*. This cause should be remanded for imposition of a life sentence.

II

The denial of defense requested jury instructions regarding legal defenses to all counts in the indictment, and the misleading and erroneous instructions of the lower court as to Count II of the indictment, had the practical effect of preventing the jury from considering Robert Parker's defense to any of the counts of the indictment, and of providing the jury with a theory of criminal liability as to Count II that was unsupported by the evidence, but argued by the prosecutor. These actions violated the defendant's right to a fair trial by an impartial jury, and procedural due process, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9, 16 and 22 of the Florida Constitution.

In the opinion rendered by this Court on September 6, 1984, the Court rejected the appellant's contention that an "independent act" jury instruction was required. In so doing, on page 3 of the opinion, the Court wrote: "Parker was on the scene and was still demanding repayment when Padgett was murdered." This statement is grossly inaccurate and without any support in the record whatsoever.

The undisputed evidence showed that Robert Parker and Elaine Parker were sitting in Elaine Parker's car when Tommy Groover shot and killed Richard Padgett outside the car. (T. 1844-1845). Furthermore, the issue of repayment had been resolved earlier in the day when Groover gave Robert Parker a gold cross and chain to hold as collateral. (T. 1826). Charlie Brown had said that he would "square up" with Groover on behalf of Padgett the next day, so Parker believed that the problem of money being owed had been resolved (T. 1838). Not only was there no evidence that Parker was demanding money from Padgett or Groover at the scene of Padgett's murder, there was not even any evidence that Groover was demanding money from him at that point.

The Court correctly states that the defendant would be entitled to an independent act instruction if any evidence which would support the theory of independent act was presented, and indicates that such evidence should be viewed in the light most favorable to Robert Parker. The Court apparently over-looked the evidence that was favorable to Robert Parker and which does support an independent act instruction:

(1) Parker was "not the least bit upset" with Padgett. (T. 1141).

(2) Padgett owed Parker nothing. (T. 1832-1833).

(3) Parker had no intention of killing Groover if Groover did not pay Parker. (T. 1822-3, 1827).

(4) There was no urgency for Parker to collect any money from Groover or Padgett because Parker had obtained Groover's gold jewelry to hold as collateral. (T. 1826).

(5) There was no reason for Groover to kill Padgett over a drug debt that night because Charlie Brown was going to pay it for Padgett the next day, and Groover knew it. (T. 1838).

(6) Parker had prevented Padgett from being seriously injured by Groover earlier that evening, and had taken Padgett to Carl Barton's house to clean his wounds. (T. 1470, 1840-1842).

(7) Parker was unaware of Groover threatening Padgett with a gun. (T. 1845, 1935).

(8) Parker thought Padgett was going to be dropped in the woods to walk home, not to be killed. (T. 1494, 1844).

(9) Padgett was not killed for a debt because he had $16.00 in his wallet that was left undisturbed. (T. 1117-1118).

(10) Parker and Padgett were good friends. (T. 1138, 1816).

(11) Groover and Padgett hated each other from previous encounters. (T. 1138, 1636, 1843).

It was the theory of the defense that Groover killed Padgett for personal reasons unrelated to any kidnapping.

The Court says "The murder was a natural and foreseeable culmination of the motivation for the original kidnapping." Such conclusory language undermines the very purpose of the independent act rule, which is that the issue of whether or not the murder was a "natural and foreseeable culmination" of the underlying felony is a question of fact for the jury to decide. *Bryant v. State*, 412 So.2d 347, 350 (Fla. 1982). Whether or not the homicide was "outside of and foreign to the common design," is a question for the trier of fact. *Bryant*, at 349.

The opinion by this court contradicts itself. In the second paragraph of page 2, the Court recognizes that the defendant Robert Parker presented evidence that he " . . . had no indication that Groover planned to kill Padgett or Dalton and that these murders were not part of any common scheme or in furtherance of any common goal." this is precisely the evidence that requires an independent act instruction.

The Court also failed to address the issues raised by appellant in Point II on Appeal in his brief, which involved the propriety of the lower court's refusal to instruct the jury on duress as a defense and instead instructed the jury that duress is not a defense to homicide, regardless of the circumstances. In its opinion, the Court states on page 4, that the defendant "defended his actions on a theory of independent act of a co-felon in the Padgett murder and a theory of duress in the Dalton and Sheppard killings." The ensuing discussion infers that the jury rejected a duress defense. Nothing could be further from the truth

The truth of the matter is that the jury was incorrectly instructed in two critical areas as to the Sheppard murder. The jury was told, first, that it could predicate the defendant's liability for the Sheppard murder on a felony-murder theory (R. 388, T. 2288-2290). Secondly, the jury was told, without qualification, that duress was not available as a defense to homicide. (R. 385, T. 2286). Both instructions were given over objection by the defense. (T. 2109-2112, 2265-2266). The State argued felony murder in summation (T. 2274-2275) and argued that, because duress was not a defense, the defendant was guilty even if his testimony was believed. (T. 2147-2149, 2153). The

guilty verdict of the jury can hardly be seen as a rejection of the defendant's testimony; in light of the jury recommendation of life, it is reasonable to conclude that the defendant's testimony was accepted, but that his defense was rejected because of the court's instructions. See Section 921.141(6)(e), *Fla. Stat.*

This Court, in page 6 of its own opinion, ruled that there was no felony involved in the Sheppard murder, and struck felony murder as an aggravating circumstance. The lower court was therefore incorrect in instructing the jury on felony murder. The State conceded in its brief that, under *Goodwin v. State*, 405 So.2d 170 (Fla. 1981), duress *is* a defense to felony-murder. (S.B.6). The jury was therefore instructed in a legally incorrect and factually misleading manner in two critical areas relating to the Sheppard murder. Not only was the jury told that a lawful defense supported by the evidence was not a defense at all, but they were permitted to convict the defendant on a theory of liability that was *not* supported by the evidence.

The erroneous and misleading instructions permitted the prosecutor to tell the jury that the defendant was guilty of felony-murder because he took Ms. Sheppard's necklace after she was killed, and that he was therefore guilty even by his own testimony. From the third degree murder verdict in the death of Judy Dalton, it was apparent that the jury applied the felony-murder rule broadly. Because the lower court's erroneous instructions permitted the jury to convict the defendant based on his own testimony, the prejudice is apparent and significant. The defendant should be given a new trial as to the Sheppard murder where the jury can be properly instructed.

As the United States Supreme Court has said,

> No principle of procedural due process is more clearly established than that notice of the specific charge, *and a chance to be heard in a trial of the issues raised by that charge* . . . are among the constitutional rights of every accused. (emphasis supplied) *Cole v. Arkansas*, 68 S. Ct. 514, 517 (1948).

Robert Parker has yet to be given a chance to be heard, and he has yet to have a jury consider his defenses. A new trial is in order.

Respectfully submitted,

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(Certificate Of Service Omitted In Printing)

IN THE SUPREME COURT OF FLORIDA

(Caption Omitted In Printing)

OPPOSITION TO MOTION FOR REHEARING OF THIS COURT'S OPINION.

COMES NOW, The State of Florida, by and through the undersigned counsel, pursuant to Rules 9.300 and 9.330, F.R. App.P., and opposes Appellant's Motion for Rehearing of this Court's opinion dated September 6, 1984. The following is submitted in support thereof:

I

Appellant's challenge to the Court's opinion under this point amounts to reargument over the propriety of a judicial override of a jury's sentencing recommendation of life imprisonment. In claiming a violation of the standard enunciated in *Tedder v. State*, 332 So.2d 908 (Fla. 1975), Appellant ignores this Court's opinion in *Ross v. State*, 386 So.2d 1191 (Fla 1980) cited in the State's brief at p.62. In *Ross*, this Court acknowledged that a jury recommendation under our trifurcated death penalty statute should be given great weight and serious consideration, but the trial judge is not required to impose the sentence recommended by the jury. Instead the "trial judge must still exercise its reasoned judgment in deciding whether the death penalty should be imposed." *Id* at 1197.

The position advocated by Appellant precludes the ability of the sentencing court to override a jury's recommendation of life imprisonment thereby undermining Florida's constitutionally approved trifurcated process in favor of "rubber stamping" a jury recommendation.

Counsel for Appellant obviously disagrees with the trial court's reasoning and with the analysis of this Court. However, such disapproval is not a proper ground for rehearing. A judicial override of a jury's sentencing recommendation of life imprisonment is constitutional. *Spaziano v. Florida*, ___ U.S. ___, 82 L.Ed.2d 340, 350-357 (1984)

In *Spaziano v. Florida*, the United States Supreme Court stated that the responsibility of the reviewing court is "not to second guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process in (sic) not arbitrary or discriminatory." *Id* at 82 L.Ed.2d 356. This Court has conducted meaningful and careful review of Appellant's sentence and has concluded the sentence of death was not arbitrarily or capriciously imposed. Contrary to the represention (sic) in motion, this Court has not limited its scope of review to the trial court's sentencing order.

II

Appellant's argument over the propriety of the defense requested jury instruction regarding an "independent act" overlooks Appellant Parker's involvement as a principal. The quarrel with this Court's reference to Parker's presence "on the scene" (motion at p.5-6) is nothing more than a sematical (sic) disagreement. The facts set forth in this Court's opinion are clearly supported by the record. Moreover, the factual circumstances of this case and *Bryant v. State*, 412 So.2d 347 (Fla.1982), are strikingly dissimilar as duly noted in brief and at oral argument before this Court.

Appellant's entire motion for rehearing is a condensed version of the points and argument advanced in brief and at oral argument. The motion urges this Court to reconsider matters previously considered and determined adversely to the position advocated by Appellant. As such, Appellant's motion is contrary to the governing rules of appellate procedure and established case law. Rule 9.330, F.R. App.P.; *Whipple v. State*, 431 So.2d 1011 (Fla. 2nd DCA 1983); *State of Florida ex rel Jaylex Realty Co. v. Green*, 105 So.2d 817 (Fla. 1st DCA 1985); *Williams v. State*, 113 So.2d 833 (Fla. 1959); *Sherwood v. State*, 111 So.2d 96 (Fla. 3rd DCA 1959). Inasmuch as the motion consists of reargument, it is improper and should be denied.

WHEREFORE, based on the foregoing argument and authority, Appellee, the State of Florida, respectfully urges this Court to deny Appellant's motion for rehearing.

Respectfully submitted,

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(Certificate Of Service Omitted In Printing)

IN THE SUPREME COURT OF FLORIDA
MONDAY, DECEMBER 3, 1984

(Caption Omitted In Printing)

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, EHRLICH and SHAW, JJ., Concur

McDONALD, J., Dissents

IN THE SUPREME COURT OF FLORIDA

(Caption Omitted In Printing)

PER CURIAM.

The appellant, Robert Lacy Parker, was convicted of two counts of first-degree murder, and one count of third-degree murder, and was sentenced to death. We affirmed the convictions and sentences. *Parker v. State*, 458 So.2d 750 (Fla.1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985). Appellant's motion to vacate judgment and sentence and his application for a stay of execution before the trial court, pursuant to Florida Rule of Criminal Procedure 3.850, was denied by the trial court without an evidentiary hearing. Appellant seeks review of that denial. We have jurisdiction, article V, section 3(b)(1), Florida constitution, and we affirm.

Appellant raises three claims, two of which we find to be meritless, and only one which warrants discussion.

Appellant alleges a *Brady*[1] violation because the prosecutor at appellant's trial had made some cash payments, for lunch, travel expenses and loss of earnings, to several state witnesses. While we express no opinion on the propriety of these payments, *see Groover v. State*, 489 So.2d 15 (Fla.1986), we find appellant has shown nothing entitling him to relief.

Initially, we note that this issue has been addressed before. Counsel for appellant discovered, subsequent to appellant's trial and advisory sentencing proceeding, that three witnesses, Carl Barton, Spencer Hance and Joan

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Bennett, had each received $20 from the prosecutor during the course of appellant's trial. Appellant brought this issue to the trial court's attention in his motion for new trial; this motion was denied. Appellant raised this issue before this Court on direct appeal; we found the issue to be insufficient to require reversal. 458 So.2d at 752. In the hearing below upon the instant motion, the trial court stated in its order denying appellant's motion for a subpoena duces tecum for records of these payments in the control of the state's attorney's office and motion for evidentiary hearing, that the evidence sought to be subpoenaed was cumulative to that presented in appellant's motion for a new trial, and raised on direct appeal before this Court. We agree.

Even if we assume that the nondisclosure of these small payments were a *Brady* violation, and that evidence of the extent and amount of these payments was not available to appellant until this year as counsel for appellant alleges, we find that appellant is not entitled to relief. In *United States v. Bagley*, ___ U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the United States Supreme Court held that evidence is "material" for *Brady* purposes, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 3384. Under this test, appellant's claim must fail. Appellant concedes that the testimony of Bennett and Long was crucial to the state's case. Our review of the trial record shows that appellant cross-examined Bennett about her interest in testifying, informing the jury that Bennett received a reduction in charges from first-degree murder to accessory after the fact in exchange for her testimony against appellant. Long was similarly cross-examined by appellant about his interest in testifying, informing the jury that Long,

who shot one of the victims, Nancy Shepard (sic), was allowed to plead guilty to second-degree murder and received a thirty-year prison sentence in exchange for his testimony against appellant. Applying the *Bagley* test, we must conclude that even if the jury had been informed about the one or two $20 dollar payments each of these witnesses allegedly received, the result of the trial would not have been different.

Appellant alleges this same *Brady* violation with numerous collateral witnesses and contends that these collateral witnesses contradicted appellant's testimony, thus undermining appellant's credibility with the jury. According to appellant's argument, had his counsel been aware of these payments, he would have been able to show these witnesses' interest in testifying. Even if true, we find the result to be totally speculative. The amount of money involved in these payments is small, and was characterized as simply lunch money, travel expenses and loss of earnings, and we cannot conclude that had the defense been aware of the payments, the result of appellant's trial would have been different.

Accordingly, the trial court's denial of relief is affirmed.

It is so ordered.

McDONALD, C.J. and ADKINS, BOYD, EHRLICH and SHAW, JJ., concur.

OVERTON, J., dissents with an opinion.

OVERTON, Justice, dissenting.

I find the allegations require an evidentiary hearing.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ROBERT LACY PARKER,
Petitioner,

vs.

RICHARD DUGGER, Secretary, Florida Department of Corrections, and ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,
Respondents.

Case No. 86-797-Civ-J-12

ORDER
DENYING RELIEF AS TO CONVICTIONS BUT REQUIRING RESENTENCING OF PETITIONER BY TRIAL JUDGE

This cause is before the Court on a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (1982), filed by ROBERT LACY PARKER, a death-row inmate at Florida State Prison. The petition seeks relief both with respect to the convictions against petitioner and with respect to the death sentence on one of the convictions. The Court will deny relief as to the convictions, but will grant relief as to the sentence of death.

I. BACKGROUND

(A) Procedural History

On February 25, 1982, petitioner was charged by indictment with the crimes of first-degree murder for the shooting deaths of Richard Padgett ("Padgett") and

Nancy Sheppard ("Sheppard"). By an amended indictment returned on May 20, 1982, petitioner was charged with a third count of first-degree murder for the death of Jody Dalton ("Dalton").

Petitioner's tr[illegible]egan on February 28, 1983, and on March 9, 1983, the jury returned a verdict of guilty as charged as to Counts I and II and guilty of third-degree murder as to Count III. On March 14, 1983, the trial court conducted an advisory sentencing proceeding and, at the conclusion of this proceeding, the jury recommended sentences of life imprisonment for both of petitioner's first-degree murder convictions. The trial judge overrode the jury's recommendation as to petitioner's conviction under Count II and imposed a sentence of death for the murder of Nancy Sheppard. Petitioner also received a sentence of life imprisonment under Count I and a fifteen-year term of imprisonment under Count III. These sentences were imposed on April 29, 1983.

The Supreme Court of Florida affirmed petitioner's death sentence on September 6, 1984, and denied his request for rehearing on December 3, 1984. *Parker v. State*, 458 So. 2d 750 (Fla. 1980) ("*Parker I*". The United States Supreme Court denied certiorari in *Parker v. Florida*, 470 U.S. 1088 (1985).

On May 19, 1986, petitioner filed a motion to vacate his convictions and death sentence, pursuant to Fla. R. Crim. P. 3.850. Approximately one month later, on June 20, 1986, the Governor of the State of Florida signed a death warrant and petitioner's execution was scheduled for 7:00 a.m. on July 15, 1986. Following the issuance of the death warrant, petitioner filed a motion for a stay of

execution, a motion for an evidentiary hearing and a supplement to the motion to vacate his convictions and death sentence. These motions were all denied by the trial court on July 1, 1986, and on July 8, 1986, the Florida Supreme Court affirmed. *Parker v. State*, 491 So. 2d 532 (Fla. 1986) ("*Parker II*").

Petitioner filed the petition in this Court on July 12, 1986, together with a motion for stay of execution and a motion for leave to proceed *in forma pauperis*. On July 14, 1986, the State filed a response to the petition and a Motion for Dismissal or Summary Disposition. The petition presents fifteen claims of alleged constitutional deprivation. The complex factual and legal questions raised in the petition prompted the Court to grant petitioner's motion for stay of execution of his sentence. The Court subsequently denied respondents' motion to vacate stay of execution, and held a nonevidentiary hearing on the petition on July 24, 1986. After due consideration of the petition and additional memoranda filed in support and opposition thereto, the Court found it necessary to hold an evidentiary hearing on the fourth ground in the petition, concerning payments to prosecution witnesses.[1] This hearing was held on February 18, 1987. Final written submissions concerning this issue were received from both parties in March 1987.

(B) Facts of the Crimes

Evidence introduced at trial revealed that petitioner sold various illegal drugs on a regular basis. As part of

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[1] *See infra* Part II, at pp. 14-30.

his operation, he would advance drugs to Tommy Groover ("Groover") and Billy Long ("Long") with the expectation they would eventually pay him for the drugs. It appeared that Groover in turn had "fronted" drugs to Padgett. On Saturday, February 6, 1982, petitioner, carrying a .22 revolver, set out to collect drug money owed to him by some of his friends. In so doing, he went to Groover's house and asked him to pay for drugs which had been advanced previously. Testimony showed that petitioner was very angry about the unpaid debt. In fact, when Groover was unable to make the payment, petitioner threatened to hang him. Shortly thereafter, Long and Groover, armed with a shotgun, visited other individuals to collect drug debts.

On this particular Saturday night, Groover and Long saw Padgett and Sheppard at a bar. When it appeared that Padgett was unable to pay a drug debt Groover persuaded Padgett and Sheppard to go with him and Long to petitioner's trailer. Thereafter, Long drove Sheppard to her house. Groover, petitioner, and petitioner's ex-wife went to petitioner's parents, junkyard.[2] At the

[2] The specific events leading up to the visit to the junkyard were in dispute at the trial. Joan Bennett testified that petitioner, his ex-wife, Groover, and Long were at a bar together early in the evening. She further testified that at the bar petitioner said he was tired of people owing him money for drugs. During his testimony, petitioner stated that he had not been at the bar but had been at Jerry Buruce's house for an oyster roast. In any event, petitioner, his ex-wife, Groover, and Padgett ended up at the junkyard. Long went his separate way and did not meet Groover and petitioner again until the following evening.

junkyard, Groover beat Padgett because Padgett was unable to satisfy the drug debt. A short time later, Padgett was taken by car to a wooded area. Petitioner's ex-wife drove the car; petitioner, Groover, and Padgett were passengers. Groover and Padgett got out of the car. Moments later, Groover fatally wounded Padgett with a single gunshot wound in the back of the head. Groover also inflicted Padgett with stab wounds which would have been fatal had Padgett not died immediately from the gunshot.

Sometime after midnight, while looking for Long, petitioner, petitioner's ex-wife, and Groover saw Dalton at a topless bar. Dalton left with the others to look for Long. Prior to driving to Long's house, they drove to the St. Johns River where Groover got out of the car and threw the pistol with which he had shot Padgett into the river. Then, they returned to petitioner's trailer.

Leaving Dalton at petitioner's trailer, the other three individuals drove to Joan Bennett's ("Bennett") trailer and took her with them back to petitioner's trailer. When they returned to the trailer, petitioner was outraged that Dalton had used some of his drugs. A short time later, Bennett, Groover, Dalton, petitioner, and petitioner's ex-wife went to Donut Lake to "drink beer and party." Once they arrived at Donut Lake, Groover, Dalton, and petitioner got out of the car. Groover then pulled a gun from his boot and shot Dalton several times in the head. A medical examiner later determined that Dalton had received four .22 caliber gunshot wounds to the head. Two of the wounds would have been fatal; each would have caused immediate unconsciousness. The medical

examiner could not determine which gunshot wound was inflicted first.

After Groover shot Dalton, Groover and petitioner took rope and concrete blocks from the trunk of the car, tied the blocks to Dalton's body, and took her body out into the lake. They all returned to petitioner's trailer, where they burned their clothes and shoes and Dalton's clothes. Then they went back to Donut Lake to look for petitioner's knife and wallet. After finding petitioner's wallet and after throwing water on blood in the dirt, they took Bennett back to her trailer.

Sometime in the early morning hours of Sunday, February 7, 1982, Groover, petitioner, and petitioner's ex-wife went to Long's house to ask Long for directions to Sheppard's house. Long was not there when the trio arrived, but he did return home between 6:30 a.m. and 6:45 a.m. According to Long, either petitioner or Groover told him that Padgett wanted to see his girlfriend, Nancy Sheppard. Long, got in the car with the others and told Groover how to get to Sheppard's house. They picked up Sheppard and drove to the wooded area where Padgett had been killed.

When they arrived at the wooded area, petitioner told the seventeen-year-old Sheppard that Padgett was wandering around "high" and wanted to see her. When they came to the ditch where Padgett's body was, petitioner and Long got out of the car, and walked over to the ditch. Petitioner showed Long the body and, in essence, told him that if he did not kill Sheppard he would end up like Padgett. Petitioner then returned to the car and asked Sheppard to get out. She walked over to the ditch, saw

Padgett's body, and fell to her knees. At that moment, Long, acting pursuant to petitioner's order, shot Sheppard in the back of the head twice with a .22 pistol. Long testified that Groover and petitioner told him to shoot her again; he fired the gun until it was out of bullets. Petitioner then cut Sheppard's throat and took her necklace and class ring.

The medical examiner determined that five .22 caliber gunshot wounds caused Sheppard's death. She had been stabbed seven times in the neck. The stab wounds were not fatal. The gunshot wounds caused immediate unconsciousness.

Petitioner, who testified on his own behalf at trial, has a somewhat different view of the facts. *See generally* Exhibit A to Petition for Habeas Corpus, Record and Transcript of Proceedings (hereinafter "R.") 1804-1991. Briefly stated, according to petitioner, he was an unwilling participant in the murders of Padgett, Dalton, and Sheppard. He claimed that the murders were orchestrated by Groover and that Groover threatened to harm petitioner's family if petitioner did not cooperate. Petitioner testified that he did not know that Groover planned to kill Padgett or Dalton. With regard to the murder of Sheppard, he stated that he had a notion that Groover and Long were planning to kill her, but he claimed he was not an active participant in the homicide. Petitioner further testified that the murders were not part of any common scheme or in furtherance of a common goal.

(C) Trial – Guilt Phase

The guilt phase of petitioner's trial commenced on February 28, 1983, with the selection of the jury. Jury

selection was completed on March 1, 1983, and counsel for the state and counsel for petitioner were afforded an opportunity to make an opening statement on March 2, 1983. In its case-in-chief, the state called twenty-one witnesses, including law enforcement personnel, medical examiners, individuals who discovered the bodies of the victims, and individuals who knew petitioner and had contact with him either shortly prior to, during, or shortly after the murders of Padgett, Dalton, and Sheppard.

The first part of the state's case was devoted to depicting the scenes of the crimes, explaining how the bodies of the victims were discovered and identified, and describing the various locations related to the events surrounding the murders. Next, the state offered testimony of how the events unfolded on Friday, February 5, 1982, Saturday, February 6, 1982, and Sunday, February 7, 1982. The state's key witnesses were Bennett and Long.

The defense called nine witnesses, including petitioner. The defense's theory of the case asserted that petitioner was coerced into participation in the killings and then framed by the true perpetrators so they could receive more favorable treatment. A key defense witness was Richard Ellwood ("Ellwood"), who testified that Long had claimed credit for the Sheppard murder and that Long had lied about petitioner's role.

Presentation of evidence was completed on March 8, 1983. Counsel for the state and counsel for petitioner delivered closing arguments on the following day, March 9, 1983. That same day, after deliberating approximately three hours and twenty-five minutes, the jury reached

verdicts as to the three counts with which petitioner was charged. The jury found petitioner guilty of first-degree murder in the deaths of Padgett and Sheppard and guilty of third-degree murder in the homicide of Dalton.

(D) Trial – Sentencing Phase

On March 14, 1983, the trial court reconvened the jury for an advisory sentencing proceeding. The state introduced evidence of a prior felony conviction by petitioner. In mitigation, petitioner presented testimony from his mother, grandmother, sister, cousin, a neighbor, and a jailhouse minister. Additionally, petitioner introduced evidence of the plea agreement for Elaine Parker and the advisory sentences and actual sentences for Groover. The state sought the death penalty for both the Padgett and Sheppard murders.

The state argued seven aggravating circumstances to the advisory jury: (1) previous conviction of another capital crime or of a violent felony; (2) knowingly creating a great risk of death to many persons in the commission of the crimes for which petitioner was to be sentenced; (3) the crimes were committed while engaged in the crimes of robbery (Sheppard) and/or kidnapping (Padgett); (4) the crimes were committed to avoid lawful arrest; (5) the crimes were committed for pecuniary gain; (6) the crimes were especially wicked, evil, atrocious or cruel; and (7) the crimes were committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. Petitioner pressed several statutory mitigating factors, but the heart of his sentencing-phase

defense was several nonstatutory mitigating circumstances which had previously been endorsed by the Florida Supreme Court. Petitioner sought jury instructions on the nonstatutory mitigating circumstances, but the judge denied the proposed instructions. Petitioner also sought a specific verdict form that would reflect which aggravating circumstances the jury found to be proved but the judge denied that request as well.

The advisory jury recommended life imprisonment for both murders, finding in each case that "sufficient aggravating circumstances do exist to justify the sentence of death, sufficient mitigating circumstances do exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death."

The judge took the advisory jury recommendations under consideration and held a hearing on April 29, 1983, to impose sentences. Petitioner presented no additional evidence at the hearing. The state brought in three witnesses, Padgett's mother and sister and Sheppard's mother, to testify regarding the murder victims and their families' recommendation for petitioner to receive the death penalty. Petitioner's counsel objected to the testimony but the objection was overruled. The prosecutor also read a written statement from the Sheppard family.

The sentencing order enumerates the presence or absence of statutory aggravating factors and statutory mitigating circumstances. The order is silent regarding nonstatutory mitigating circumstances. The judge found the presence of five aggravating factors in the Padgett

murder and six aggravating factors in the Sheppard murder.[3] He further found no mitigating circumstances to outweigh the aggravating circumstances in each murder. He then sentenced petitioner to death for the Sheppard murder and life imprisonment for the Padgett murder. With regard to the standard set forth in *Tedder v. State*, 332 So. 2d 908 (Fla. 1975), for determining the propriety of a judge override of a jury recommendation of life imprisonment, the order stated: "It is suggested that the facts and circumstances show that this test has been fully met."

(E) Issues Presented

Although petitioner raises fifteen grounds for relief, the Court will address only thirteen of the arguments. Since the Court grants relief as to the sentence of death, it is not necessary to rule on two other grounds challenging the sentence which are raised in the petition. *Messer v. Florida*, 834 F.2d 890, 895 n.1 (11th Cir. 1987).

Grounds Thirteen and Fifteen argue the correctness of the trial judge's decision to override the jury recommendation of a life sentence on Count II. These arguments should be presented to the judge at the new sentencing hearing, and if necessary to the state supreme court. Given the present disposition, this Court is not the forum in which to resolve the questions raised by those two grounds.

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[3] The Florida Supreme Court subsequently found that the evidence was insufficient to prove two of these aggravating factors. *See Parker I*, 458 So. 2d at 754.

Respondents have raised the issue of procedural bar for the review of some claims raised by petitioner. Petitioner did not present some of the grounds in this petition in the direct appeal of his conviction to the Florida Supreme Court. He did, however, list these grounds in a petition for rehearing of his direct appeal. Respondents opposed the grounds newly included in the rehearing petition solely on procedural grounds. Respondents accordingly argue that the Florida Supreme Court's rejection of the rehearing petition without opinion represents a ruling on the procedural issue and bars the argument of those grounds in a federal habeas corpus petition. Petitioner asserts that the denial of the rehearing petition represents a denial on the merits, or, alternatively, that the Florida Supreme Court's expansive scope of review on direct appeal constituted a waiver of the procedural rules which might bar consideration of the grounds in this Court.

The resolution of the procedural default question cannot be made readily by reference to precedent within this Circuit. One panel opinion faced this procedural question and concluded, "if the state supreme court on direct appeal overlooked [petitioner's] failure to raise [a] claim and *sua sponte* passed on its merits, federal habeas review would not be barred. . . . [B]y independently reviewing the record, the Florida Supreme Court waived [petitioner's] failure to raise [a] claim on direct appeal." *Mann v. Dugger*, 817 F.2d 1471, 1475, *reh'g in banc granted & opinion vacated*, 828 F.2d 1498 (11th Cir. 1987). This analysis fits tightly with the facts of the present petition. The Florida Supreme Court plainly stated the expansive scope of its review on direct appeal. *See Parker I*, 458 So.

2d at 754 ("In addition to considering all other issues raised on appeal, we have conducted an independent review of the record on trial and find no reason to award a new trial."). Petitioner's trial counsel clearly raised his objections on the two grounds which respondents claim are procedurally barred. The Florida Supreme Court could not have overlooked the presence of these issues. Following the panel's analysis in *Mann*, then, would lead this Court to find no default. Since the panel opinion was vacated, however, the Court must test the persuasiveness of the reasoning against other law in this Circuit.

A second panel opinion directly challenged the reasoning set forth by the *Mann* panel. *Lindsey v. Smith*, 820 F.2d 1137, 1143 (11th Cir. 1987). Although the differences between the two strains of thought could be reconciled by reference to the differences in state law scope of review between Florida (*Mann*) and Alabama (*Lindsey*), a recent *en banc* opinion strongly suggests that the majority of judges of the Eleventh Circuit Court of Appeals rejects the *Mann* panel's approach and would find procedural default when (as in the present case) petitioner asserts in a petition for rehearing to the state supreme court an argument not raised on direct appeal. *Hargrave v. Dugger*, 832 F.2d 1528, 1530 (11th Cir. 1987) (*en banc*) (dictum). The Court therefore concludes that petitioner is procedurally barred from pursuing Grounds One (felony murder instruction[4]) and Eleven (admission of false exculpatory statement upon arrest for different crime[5]) by way of federal habeas review, but the state of the law on the

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[4] *See infra* Part V(A), at pp. 41-47.

[5] *See infra* Part III(D), at pp. 35-37.

question of procedural default is sufficiently unsettled to warrant discussion of the merits of petitioner's claims, in an abundance of judicial caution.

II. PAYMENTS TO WITNESSES
Petitioner's Ground Four

(A) Background

Petitioner argues that the prosecution failed to disclose favorable evidence in the form of payments to witnesses, in violation of *Brady v. Maryland*, 373 U.S. 667 (1963), and further that the prosecutor actively misrepresented the existence of such evidence during trial, in violation of *Giglio v. United States*, 405 U.S. 150 (1972).[6] Respondents counter, in essence, that petitioner has failed to establish the occurrence of either a *Brady* or *Giglio* violation. Moreover, according to respondents, even if a violation did in fact take place, petitioner has not shown that there is any reasonable likelihood the information would have influenced the outcome of the case.[7]

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[6] The safeguards which emanate from *Brady* and *Giglio* have their roots in the due process clauses of the fifth and fourteenth amendments. Petitioner claims that as a result of the violations herein alleged, his fifth, sixth, and fourteenth amendment rights were impinged upon.

[7] In their Motion for Dismissal or Summary Disposition, respondents interpret petitioner's contention that the prosecution failed to reveal favorable evidence as a *Brady* violation claim and as a claim that the prosecution violated a state discovery rule (Fla. R. Cr. P. 3.220). The Court, however, reads petitioner's claim as one grounded in *Brady* and *Giglio*, not in a violation of a state discovery rule.

A chronological review of how this issue came to light, both factually and procedurally, and its treatment by the state courts and this Court is essential to its resolution. The following summary is undisputed.

Prior to trial, on March 3, 1982, defense counsel filed a Motion for Production of Favorable Evidence, pursuant to Fla. R. Cr. P. 3.220. Contained in paragraph C(4) of the motion was a request for the following: "Any scientific or medical report which tends to establish the accused's innocence, to mitigate punishment, or to impeach the credit or contradict the testimony of any witness whom the state will call at the trial of the cause." On August 18, 1982, defense counsel filed a motion to compel discovery, asking the prosecution to reveal the following:

> The existence and substance, and manner of execution or fulfillment of any promises, agreements, understandings, or arrangements, either verbal or written, between the State of Florida and any codefendants, prosecution witnesses, his attorney or representative, or other persons involved in this case wherein the State has agreed: to make any other recommendations of benefit or to give any other consideration to him or her.

R. 156-58. It is clear from the record that the fact certain payments had been made to prosecution witnesses was not disclosed by the prosecution in its responses to the aforementioned motions.

Sometime between the conclusion of the trial and sentencing, defense counsel learned that Chief Assistant State Attorney Ralph Greene ("Greene") had given three

state witnesses twenty (20) dollars each during the trial.[8] This issue was brought to the attention of the trial court in petitioner's Amendment to Motion for New Trial, filed on April 29, 1983. R. 464-466. During argument on the motion, the prosecutor acknowledged that these witnesses had been given twenty dollars each, not as payment for testifying but as expense money for food. R. 2529.[9] The trial court determined that the payments at issue had not resulted in any undue influence on any witness and denied the amended motion for new trial. R. 2530.

On April 28, 1986, further evidence that some witnesses had received money from the prosecution during the trial came to the attention of defense counsel. On that day, an assistant state attorney forwarded to defense counsel additional material relating to the case, including copies of reports of interviews of various witnesses which had been conducted by special agents of the Federal Bureau of Investigation. The information with regard to the interviews revealed that the prosecution may have given Bennett more than twenty dollars and additionally, that other state witnesses received money from the prosecution. R. 16-25.

The issue of the prosecution's failure to disclose payments to witnesses was among the twenty issues raised

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[8] The three witnesses who allegedly received payments were Carl Barton, Spencer Hance, and Joan Bennett.

[9] In response to a comment by defense counsel that twenty dollars was an extravagant amount for lunch, the prosecutor stated, "It wasn't one lunch, it was a lot of lunches and breakfasts and dinners during the course of that trial. . . . " R. at 2529.

regarding the guilt phase of the trial by petitioner on direct appeal. The Florida Supreme Court did not discuss this issue but stated that "all [twenty issues] have been considered in depth and found insufficient to require reversal." *Parker I*, 458 So. 2d at 752.

Petitioner again raised this issue before the trial court in his motion to vacate judgment and sentence and his application for stay of execution, filed pursuant to Fla. R. Crim. P. 3.850. Petitioner also sought a subpoena duces tecum for records related to any payments made to witnesses and asked for an evidentiary hearing on the matter. In denying petitioner's requested relief, the trial court determined that the evidence sought was cumulative to that which petitioner presented in his motion for new trial. Petitioner appealed the trial court's denial of his Rule 3.850 motion to the Florida Supreme Court.

The Florida Supreme Court found that even if the nondisclosure of the payments at issue resulted in a *Brady* violation, petitioner was not entitled to a new trial. Applying the "materiality" standard articulated by the United States Supreme Court in *United States v. Bagley*, 473 U.S. 667 (1985), the court concluded "that even if the jury had been informed about one or two $20 dollar payments each of these witnesses allegedly received, the result of the trial would not have been different." *Parker II*, 491 So. 2d at 533.[10] With regard to alleged payments to collateral witnesses, the court stated:

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[10] It is unclear precisely to whom the court was referring when it used the words "these witnesses". Early in its opinion,

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> The amount of money involved in these payments is small, and was characterized as simply lunch money, travel expenses and loss of earnings, and we cannot conclude that had the defense been aware of the payments, the result of appellant's trial would have been different.

Id.

This Court, after consideration of arguments advanced in support of and in opposition to the necessity of an evidentiary hearing on the issue of payments to prosecution witnesses, decided that petitioner had proffered sufficient evidence to warrant such a hearing. *See Townsend v. Sain*, 372 U.S. 293, 307 (1963); *Smith v. Wainwright*, 777 F.2d 609, 615 (11th Cir. 1985). The evidentiary hearing was held on February 18, 1987, and supplemental memoranda concerning the issue were received in March 1987.

(B) Findings of Fact[11]

The State Attorney's Office maintains an Information and Evidence Fund ("I & E Fund") for a myriad of

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the court refers to payments made to Carl Barton, Spencer Hance, and Joan Bennett. In the paragraph discussing the materiality of the payments, however, the court refers to Bennett and Long. This Court reads the words "these witnesses" as referring to Bennett and Long.

[11] Petitioner called the following witnesses at the February 18, 1987, evidentiary hearing: Mike Weinstein, Executive Director, State Attorney's Office; Jack D. Austin, Chief Investigator, State Attorney's Office; Spencer Hance, prosecution witness at petitioner's trial; and petitioner. Additionally, petitioner

(Continued on following page)

purposes, including but not limited to gaining information, protecting witnesses, paying expenses of witnesses, paying confidential informants, and making drug buys in undercover investigations. The money is kept in a revolving account. While a $5,000 balance is allowed, the average balance is $3,500. According to Mike Weinstein, who was the Executive Director of the State Attorney's Office and in charge of this fund during the time period relevant to this issue, $6,500 to $18,000 is spent through this fund in any given year.

To obtain money from the I & E Fund in 1982-83, any assistant state attorney or investigator could go to the State Attorney and seek approval for a certain amount of money. At that time, as Chief Assistant State Attorney, Greene also could disburse money from the fund. The request for funds form required a case number or investigation number, the check number, and the person's name making the request. There was no requirement that an explanation be given as to how the money would be spent. Individual employees were required to keep a record regarding the expenditure of these funds; however, receipts did not have to be included in this record

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moved the following exhibits into evidence: numerous Information and Evidence Fund ("I & E Fund") requests executed by Greene (Petitioner's Exhibit No. 1); Deposition of Greene, taken on January 22, 1987, and attachments thereto (Petitioner's Exhibit No. 2); and an inter-office memorandum directing the Clerk of County Court to enter a nol pros in a case in which Spencer Hance's girlfriend had been charged with driving without a valid driver's license (Petitioner's Exhibit No. 3).

keeping. For security reasons, funds could be withdrawn under one case control number but used in other, unrelated cases.

A review of the I & E Fund records, reveals that between May 3, 1982, and April 8, 1983, Greene requested and received $3,400 under two case control numbers given to this case.[12] His personal records indicate that he actually spent $1,470 for various witness-related expenses in this case. The remaining $1,930 was spent in conjunction with ten to fifteen other cases and investigations, a statewide grand jury matter, and a local grand jury matter.[13] The records reflect the following individuals were paid the following amounts:

Lewis Bradley	$230.00
Lewis Bradley and Denise Long	$ 80.00
Denise Long	$ 70.00
Mrs. Long	$ 20.00
John Bradley	$ 40.00
Ken Appleton	$ 70.00
Jimmy Thompson	$ 20.00
Morris Johnson	$180.00

[12] Greene explained that he used No. 11280 through most of 1982 and used No. 1658 late in 1982 and in 1983.

[13] When questioned further about the matter by petitioner's counsel, Greene stated that it was routine practice to use just one control number at a time, even though the money was expended in different cases. He further explained that he justified expenditures under control numbers in the Parker case as "money spent on homicide prosecution" regardless of the type of case or investigation on which monies were spent.

Wayne Johnson	$100.00
Freddie Brown	$ 40.00
Sherrie and Robert Collier	$110.00
Joan Bennett	$150.00
Mike Green	$100.00
Spencer Hance	$ 40.00
Joan Bennett, Spencer Hance and Carl Barton	$ 80.00
Ed Austin	$ 20.00
"other"	$120.00
TOTAL	$1,470.00

None of the witnesses who received money was required to sign a receipt or fill out an expense voucher or claim for reimbursement.[14]

According to Greene, prosecution witnesses were given various sums of money for one or more of the following reasons: lost wages; haircuts; clothes; child care; and transportation. Greene further testified that the sums of money paid to prosecution witnesses also encompassed payments made in connection with the trial of Groover.

The various cash payments made to Bennett were not related to or connected in any way with the plea bargain

[14] In addition to the above-mentioned payments, the testimony of Spencer Hance indicates that he asked for and received Greene's assistance regarding a traffic violation with which Hance's girlfriend had been charged. While Greene did not recall this specifically, he had a vague recollection of Mr. Hance seeking his assistance as to some matter.

she received for testifying as a prosecution witness against petitioner. Moreover, Greene stated that no one was paid for his or her testimony in this case, and no one was told to conceal the fact that he or she had been compensated for expenses.

(C) Analysis

Close scrutiny of the memoranda submitted by counsel for petitioner and counsel for respondents evinces very little disagreement over the factual underpinnings of this issue. The nub of the conflict is what legal significance should attach to these facts in the context of strategies employed by the respective parties in trying this case.

Petitioner's attack on the failure of the prosecution to disclose the fact that payments had been made to witnesses in excess of amounts authorized by statute is two pronged.[15] First, petitioner claims that at a minimum the prosecution's failure to disclose the payments amounted to a *Brady* violation, that is, the State suppressed favorable evidence that was material to petitioner's guilt, as well as to the punishment he received. Citing *Bagley*, petitioner asserts that the evidence of the payments is material because "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682.

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[15] *See* Fla. Stat. § 92.142(1) (stating that subpoenaed witnesses are to be paid five dollars per day and six cents per mile).

The second argument advanced by defendant is a hybrid *Giglio* claim. In *Giglio v. United States*, 405 U.S. 150 (1972), the star government witness stated on cross-examination that the government had not promised him that he would not be indicted if he would testify against defendant. During closing arguments, the prosecutor emphasized to the jury that this key government witness did not receive any promises in exchange for his testimony. Later, sometime after the trial, it was revealed that the witness had testified under a plea agreement he had with the government. Although the prosecutor who tried the case did not know of the agreement, the Court decided that the nondisclosure was his responsibility. The Court set aside Giglio's conviction, holding that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .' " *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)); *see Bagley*, 473 U.S. at 678-80 (reaffirming the *Giglio* standard). In the present case, petitioner claims that a series of events which took place during voir dire, as well as statements made by the prosecutor during closing arguments, combined to create circumstances analogous to a situation in which false testimony is presented to a jury.

During voir dire examination, in the presence of the entire venire, an exchange took place between defense counsel and a prospective juror about witnesses who testify as part of a "deal" and about accomplice testimony. Specifically, the juror stated:

> Let me understand what you are saying. First of all you are going to tell us that a person has been bribed to make a confession or to make a

> statement. All right. Then you are saying that this person is going to be brought before us to make a testimony [sic]. Right?

R. 729. When defense counsel agreed with the characterization of this testimony as "bribed", the prosecution objected and convinced the trial judge to instruct the venire that "no one has been paid for anything, we don't accept any bribe testimony in this court from anyone." R. 729. The prosecutor, in his closing argument, told the jury that state witness Bennett had received nothing for her testimony. R. 2254. In his summation, defense counsel referred to the incident during voir dire regarding the word "bribed" and told the jury that Long and Bennett may not have received money for their testimony, but they reaped a much greater benefit in the form of plea agreements. R. 2217-19. In light of the revelation that state witnesses were indeed given money, petitioner views the actions of the prosecution as a perpetration of a fraud upon the court and argues that this fraud is equivalent to the "known use of perjured testimony."

Petitioner believes that several factors, which he claims are unique to this case, lead to the unmistakable conclusion that the failure of the prosecution to disclose payments to witnesses meets the materiality standards for both a *Brady* violation and a *Giglio* violation. First, the theme of the defense throughout the trial was that key prosecution witnesses were lying or slanting their testimony against petitioner because of inducements from the state. Second, although the payments made to witnesses were relatively small, they become significant in view of the fact that the alleged motive for the murders was a

$50.00 to $100.00 drug debt and further that critical witnesses had very little money. Third, the trial judge told the jury that no witnesses had been paid anything for their testimony, when in fact, according to petitioner, they had been. Fourth, the prosecution told the jury that some of the witnesses had been given absolutely nothing, and that others were totally unbiased. It is petitioner's position that under the aforementioned circumstances of this case, the failure of the prosecution to disclose monetary payments, coupled with representations by both the trial judge and the prosecution that witnesses were not being paid, was so prejudicial to the defense that a new trial is required. This Court disagrees.

As previously noted, petitioner appears to claim that the nondisclosure of favorable evidence resulted in both a *Brady* violation and a *Giglio* violation. In some of his submissions on this issue, however, petitioner seems to suggest the prosecution's conduct triggers only a *Giglio* analysis. For the purpose of this opinion, the Court will treat the claims separately.

To establish a *Brady* violation, the petitioner must show the following: (1) that the prosecution failed to disclose evidence; (2) that the evidence was favorable to petitioner or exculpatory; and (3) that the evidence was material. *See Halliwell v. Strickland*, 747 F.2d 607, 609 (11th Cir. 1984), *cert. denied*, 472 U.S. 1011 (1985). This Court finds that the petitioner has met the first two prongs of this three-part test but has failed to meet the third prong.

The Supreme Court in *United States v. Bagley*, 473 U.S. 667, 682 (1985), formulated the appropriate test to

determine whether evidence is material under a *Brady* analysis:[16]

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the out come.

In the present case, the Court is not convinced the prosecution's failure to disclose the fact that payments were made to witnesses deprived the jury or the trial judge of information "sufficient to undermine the confidence in the outcome." *Id.* This determination is based upon several factors.

Contrary to petitioner's assertion that the motive for the murders in this cause was a $50.00 to $100.00 drug debt, the evidence suggested, and the prosecution argued, the unfortunate chain of events that culminated

[16] In its written submission titled Final Argument, respondents painstakingly work through the materiality standards set forth in *United States v. Agurs*, 427 U.S. 978 (1976). In short, respondents argue that petitioner failed to make a "specific demand" for disclosure of payments to witnesses; therefore the appropriate standard in this case is whether nondisclosed evidence creates a reasonable doubt about guilt that would not exist otherwise. In light of *Bagley*, however, this Court finds respondents' reliance on *Agurs* misplaced. Justice Blackmun, the author of the *Bagley* opinion, found the three separate tests for materiality in *Agurs* unnecessary. He stated that the standard formulated in a later case, *Strickland v. Washington*, 466 U.S. 668 (1984), is "sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused." *Bagley*, 473 U.S. at 682.

in the murders of three individuals was induced by petitioner's obsession with asserting control over those around him, particularly those individuals to whom he sold drugs. In this light, petitioner's argument that the amount of the payments for expenses to witnesses would have appeared significant and thus would have cast doubt on the veracity of their testimony, is unpersuasive.

Even more damaging to petitioner's argument that these payments were material, is the apparent treatment by the jury of defense counsel's attempt to impeach the two key prosecution witnesses, Long and Bennett, on cross-examination. Petitioner questioned Bennett about receiving a reduction in charges from first-degree murder to accessory after the fact in exchange for testifying against petitioner. Similarly, Long was cross-examined with regard to the plea agreement in which he was allowed to plead guilty to second-degree murder, instead of facing a charge of first-degree murder, in exchange for his testimony against petitioner. In addition to raising these points on the cross-examination of these witnesses, defense counsel argued these points vigorously during his closing argument. If the jury was not persuaded to disbelieve the testimony of these witnesses based upon the plea agreements explored on cross-examination and argued during closing arguments, the Court cannot say petitioner has met the "reasonable probability test" for materiality espoused in *Bagley* with regard to the undisclosed expense payments made to prosecution witnesses.[17]

[17] Likewise, there is a spillover effect as to the less critical state witnesses. The Court is not convinced that the jury would

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Finally, this Court's finding that there was no *Brady* violation is bolstered by its determination that the payments in question were not payments for testimony on a quid pro quo basis, but rather were payments for various expenses. That is, assuming arguendo, petitioner had been able to cross-examine witnesses about receiving payments, the prosecution could have swiftly rehabilitated these witnesses by simply inquiring as to the purpose of the payments, eliciting a response that the money was not accepted in exchange for testimony, but was reimbursement for expenses.[18]

Turning to petitioner's contention that the trial judge's instruction to the jury that "no one was paid anything in the case" created circumstances equivalent to the known use of perjured testimony, the Court finds the claim meritless.[19] The flaw in petitioner's argument is his

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have discredited the testimony of these witnesses because they received money for expenses when the jury would not discredit the testimony of Bennett and Long based upon the agreements they had with the state concerning the crimes for which they were charged. Bennett and Long were involved in most of the key events surrounding the murders. They placed petitioner at the scenes of the crimes and testified as to his role as a principal participant in the killings. Thus, even if the jury discredited the testimony of the other witnesses, the testimony of Bennett, Long, and petitioner himself could have resulted in the jury rendering the identical guilty verdicts.

[18] In his final memorandum on this issue, filed on March 4, 1987, petitioner recognizes that the payments made by the prosecution were not illegal.

[19] For the sequence of events upon which petitioner bases this claim, see *supra* at pp. 24-25.

basic premise that the statements he complains of were in fact false. A reading of the colloquy between the prospective juror and defense counsel concerning bribes and the ensuing exchange between the prosecutor and the trial judge is revealing. Clearly, the trial judge's instruction that "no one was paid anything in this case" was a statement to the effect that no one was paid money as a quid pro quo for testimony. Evidence gathered by this Court confirms this proposition. Likewise, when the statements made by the prosecutor during his closing argument are viewed in the context of the entire case, he was simply telling the jury that no one exchanged testimony for money. Again, the evidence before this Court confirms the prosecutor's statement. The fact is that all payments to witnesses in this cause were made either to reimburse the witnesses for expenses or to compensate them for lost wages. Thus, in view of the totality of the circumstances and upon consideration of the context in which the statements were made, this Court finds that neither the trial judge nor the prosecutor made false statements about payment to witnesses.

Even if the Court were to characterize the statements at issue as analogous to the known use of perjured testimony, the Court would have to determine whether the false statements created "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Bagley*, 473 U.S. at 678; *see Giglio*, 405 U.S. at 150. "The thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony . . . ." *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983). As the court stated in *Brown v. Wainwright*, 785 F.2d 1457,

1465 (11th Cir. 1986), "[t]he constitutional concerns address the realities of what might induce a witness to testify falsely, and the jury is entitled to consider these realities in assessing credibility." This Court is of the opinion that the payments to the prosecution witnesses were so *de minimis* that they cannot be considered material. That is, there is no reasonable likelihood that disclosure to the jury that prosecution witnesses received money for lost wages and various expenses would have affected the jury's verdicts or the trial judge's sentences.

III. EVIDENTIARY QUESTIONS

Petitioner alleges five grounds upon which his convictions are tainted by erroneous evidentiary rulings of the trial court. The Court cannot grant relief for these alleged errors unless petitioner establishes that the rulings denied him "fundamental fairness" in the conduct of his trial. *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir. 1984), *cert. denied*, 471 U.S. 1107 (1985). The level of error must be of a degree that it is "material in the sense of a crucial, critical, highly significant factor." *Shaw v. Boney*, 695 F.2d 528, 530 (11th Cir. 1983). The Court finds that the alleged errors neither individually nor cumulatively rise to this level.

(A) Collateral Criminal Acts – Petitioner's Ground Six

Petitioner enumerates twenty-six instances of evidence admitted into the trial that he alleges amounted to an attack on his character in an effort to create a motive for the killings. Petitioner lacks grounds to invoke this Court's review. The evidence assailed by petitioner's

argument is evidence which went to the issue of common scheme or motive, so its admission into the trial failed to render the trial fundamentally unfair. *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir. 1984). Moreover, petitioner fails to fulfill his burden of demonstrating that the evidence was a critical or highly significant factor in the prosecution's case, taken in the context of all the other evidence admitted on the motive issue. *See id.*

(B) Limitation on Cross Examination of State Witness – Petitioner's Ground Eight

Petitioner alleges that the trial court violated his constitutional right to demonstrate bias or interest of a witness when he was prohibited from inquiring of Denise Long whether she was on probation at the time of the events to which she testified. The Supreme Court has stated succinctly the standard for review of this kind of alleged error:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Upon review of these factors, the Court concludes that the error is in fact harmless beyond a reasonable doubt.

(C) Testimony Regarding Petitioner's Silence while in Jail – Petitioner's Ground Nine

Petitioner alleges that testimony elicited on cross-examination by the prosecutor from Ellwood, a defense witness, amounted to an improper comment on petitioner's post-arrest silence in violation of the rule developed in *Doyle v. Ohio*, 426 U.S. 610 (1976). Ellwood had testified on direct examination that Long, an important prosecution witness, had confessed in jail that he had lied about petitioner to get even for an earlier feud between petitioner and Long. The prosecutor inquired of Ellwood whether petitioner also had told his side of the story in jail. Although the exchange between prosecutor and witness appears to have gotten argumentative at one point, Ellwood consistently testified that petitioner did not discuss his case while in jail.

The Court perceives an important legal error in petitioner's argument. The *Doyle* rule rests on the *Miranda*[20] guarantee to post-arrest silence. The cases following *Doyle* focus on the period immediately following arrest and usually involve an arresting or attending police officer. When a criminal defendant invokes his right to counsel, the *Miranda-Doyle* analysis devolves into the sixth amendment *Massiah*[21] doctrine. The two guarantees are

[20] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[21] *Massiah v. United States*, 377 U.S. 201 (1964).

separate entitlements and based on different doctrinal foundations. Tomkovicz, *Standards for Invocations and Waiver of Counsel in Confession Contexts*, 71 Iowa L. Rev. 975, 993-94 (1986). The *Massiah* guarantee protects the criminal defendant from the use of information deliberately elicited by law enforcement officers or their agents. *United States v. Henry*, 447 U.S. 264, 270 (1980). Consequently, testimony from a jailhouse informant who passively listens to the confession of a criminal defendant does not violate the defendant's constitutional rights. *Kuhlmann v. Wilson*, 106 S. Ct. 2616, 2630 (1986).

Ellwood's testimony did not relate any statements deliberately elicited from petitioner.[22] His testimony related the truthful observation that petitioner did not discuss his case while in jail. Petitioner's right to counsel was not invaded.

If error is present on this claim, it was "invited error". *E.g.*, *Brown v. Dugger*, 831 F.2d 1547, 1559 (11th Cir. 1987) (Clark, J., concurring in part); *id.* at 1562-63 (Edmondson, J., dissenting); *United States v. Males*, 715 F.2d 568, 571 (11th Cir. 1983). Petitioner presented Ellwood's testimony to develop a theory that Long perpetrated the murders and then lied to place the blame on petitioner. The prosecutor was entitled to place the remarks in context. Whether petitioner also remarked on the events at trial had relevance to the context of Ellwood's testimony on Long's remarks. In fact, the context

[22] The Court notes that *Miranda* violations also are tested by a deliberate elicitation standard. *Arizona v. Mauro*, 107 S. Ct. 1931, 1935 (1987).

of the cross-examination question suggests that the prosecutor sought the information on conversations between Ellwood and petitioner in order to bolster further the prosecution's argument that Ellwood was lying. *See* R. 1788-91. The Court finds that petitioner has failed to demonstrate that the jury would naturally and necessarily take the questioning to be a comment on petitioner's silence. *United States v. Vera*, 701 F.2d 1349, 1362-63 (11th Cir. 1983). Moreover, petitioner's trial counsel revisited the topic on redirect examination of Ellwood. *See* R. 1792.

Even if the questioning is treated as a potential *Doyle* error, the Court notes that petitioner's post-arrest silence "was not submitted to the jury as evidence from which it was allowed to draw any permissible inference and thus no *Doyle* violation occurred in this case." *Greer v. Miller*, 107 S. Ct. 3102, 3108 (1987).

(D) Statement Made Upon Arrest for Separate Crime – Petitioner's Grounds Ten and Eleven

Petitioner argues that the admission into his trial of a statement made by petitioner upon arrest for a separate crime gives rise to two constitutional violations. One, petitioner asserts that his fifth amendment *Miranda* rights were compromised by the admission of the statement because he had not been informed of those rights prior to his uttering of the statement. Two, petitioner posits that his false exculpatory statement regarding one crime cannot be introduced on the issue of consciousness of guilt on a separate crime. Respondents argue that *Miranda*

rights were not violated because the statement was spontaneous and voluntary. Further, respondents assert that the alleged error does not rise to the level of habeas review and is procedurally barred.[23]

The facts surrounding the making of the statement are not in controversy. On February 11, 1982, Detective John Bradley of the Jacksonville Sheriff's Office arrested petitioner pursuant to an arrest warrant for an aggravated assault on someone other than the murder victims. At the time of the arrest police did not have probable cause to arrest petitioner for the murders. During the course of the arrest, Detective Bradley advised petitioner of the charge for which he was arrested and the facts underlying the charge, the pertinent fact being an allegation that he perpetrated the assault with a gun. Petitioner said to the detective that he didn't have a gun, didn't own a gun, didn't know anything about guns. Although petitioner was not prosecuted for the aggravated assault offense, his statements were introduced into the murder trial as false exculpatory statements and the jury was instructed that they could infer consciousness of guilt on petitioner's part because of the statement.

The alleged *Miranda* violation is without substance. Spontaneous, unsolicited statements by an arrestee are admissible without need for *Miranda* warnings. *United States v. Mulherin*, 710 F.2d 731, 739 (11th Cir. 1983). The reading of charges by an arresting officer cannot be construed to be an interrogation reasonably likely to elicit an incriminating response from an arrestee. *See United States*

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[23] The issue of procedural bar is resolved *supra* Part I(E).

v. Suggs, 755 F.2d 1538, 1541-42 (11th Cir. 1985) (showing copy of indictment to arrestee did not constitute interrogation); *United States v. Menichino*, 497 F.2d 935, 938, 940-41 (5th Cir. 1974) (orally informing arrestee of charges against him did not constitute interrogation).

The use of the statement in petitioner's murder trial constitutes an issue of state evidence law. Petitioner does not allege that the trial judge and reviewing court considered the question in a manner contrary to the state law on the subject. Therefore petitioner must demonstrate the significance of the admission of the evidence into the trial. At this task he fails. His argument for prejudice does not explain how, in the context of the overwhelming evidence of guilt, the admission of the statement could have affected the outcome of the trial. Additionally, petitioner's argument for prejudice assumes the irrelevance of the remarks to the murder trial, without disputing the evidentiary basis for its admission. *E.g., Douglas v. State*, 80 So. 2d 659, 661 (Fla. 1956).

(E) Cumulatively

The Court has considered the separate impact of each alleged violation of petitioner's rights. Additionally, the Court has assessed the cumulative impact of the allegations and finds that petitioner does not prove a cumulative impact sufficient to call into question the jury's verdicts.

IV. PROSECUTORIAL CONDUCT

Petitioner alleges two cases of prosecutorial misconduct, one involving cross-examination of petitioner and

the other involving comments made during the prosecutor's closing arguments. This Court's review on these matters is circumspect:

> The relevant question is whether the prosecutors' comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.* at 642.

Darden v. Wainwright, 106 S. Ct. 2464, 2472 (1986).

(A) Comment on Petitioner's Interaction with Counsel – Petitioner's Ground Seven

Petitioner took the witness stand and testified on his own behalf. During cross-examination by the prosecution, the trial broke for a supper recess. Petitioner's counsel sought and, after argument, received permission to consult with petitioner. When the trial resumed, the prosecutor vigorously questioned petitioner on the subject whether he was coached and the extent to which he consulted with his attorney. Petitioner's counsel interposed timely objection. Petitioner alleges violation of his right to counsel and violation of fundamental fairness.

No right to counsel was violated by the prosecutor's questioning. Although a defendant may not be restrained from consulting with his attorney during a court recess, *Geders v. United States*, 425 U.S. 80 (1976), a prosecutor is entitled to deal with the problem of possible improper

influence on testimony. *Id.* at 89. "A prosecutor may cross-examine a defendant as to the extent of any 'coaching, during a recess, subject, of course, to the control of the court." *Id.*

Petitioner does not provide an argument to surmount the heavy burden of demonstrating fundamental unfairness. From the narrow standard of review exercised by this Court, no unfairness is apparent. The prosecution sought to raise the inference that petitioner exploited the knowledge he gained from his attorney in order to fabricate his testimony. The theory of the case on both sides directly placed the credibility of every witness in controversy. It does not appear unfair to permit the prosecution to develop this inquiry in light of petitioner's opportunity to consult with counsel during the recess.

(B) Comments in Closing Argument of Guilt Phase – Petitioner's Ground Five

Petitioner lists several comments which he characterizes as improper, prejudicial, or inflammatory. The comments fall into three general categories: (1) remarks unfavorably describing petitioner; (2) remarks challenging the character of defense counsel; and (3) remarks of a testimonial nature. Petitioner argues that the remarks rendered his trial fundamentally unfair. Respondents of course disagree, and additionally assert that many of the remarks, and similar remarks, were not objected to by counsel at trial. The Court notes its earlier discussion of procedural default, *supra* Part I(E), and also notes that Florida would not enforce its contemporaneous objection rule if the contended error goes to a matter concerning

the fundamental fairness of the trial. *Brumbley v. State*, 453 So. 2d 381, 386 (Fla. 1984). The Court therefore perceives a convergence of relevant standards. If the error is cognizable for habeas relief, then the procedural rule also is overcome.

At the outset, the Court observes that the evidence of petitioner's guilt was great, and that the jury was instructed that arguments of counsel were not evidence, R. 2125. These two factors give confidence to the conclusion that the jury's decision rested on the evidence, not the arguments of counsel. *Darden*, 106 S. Ct. at 2472-73. The remarks describing petitioner were subject additionally to an instruction from the trial court, following defense counsel's objection, that the jury should disregard the prosecutor's characterization of petitioner, R. 2136. The remarks regarding defense counsel appear confined to comments invited by or responsive to the opening summation by counsel. *See Darden*, 106 S. Ct. at 2472. The trial court dealt adequately with the objections to the "testimonial" remarks. *See* R. 2150 ("guns everywhere" remark); R. 2252 ("6,000 felony cases a year" remark). In sum, the rhetoric from both sides was a lively exchange, often heated in the choice of words. The jury, properly instructed, can be expected to have understood the weight to accord the arguments. Petitioner's trial may not have been perfect, but due process does not depend upon perfection. Petitioner does not demonstrate the violation of due process necessary to invoke this Court's limited review of the alleged errors.

V. INSTRUCTIONS

Petitioner lists three errors in jury instructions at the guilt phase of his trial. Petitioner challenges the trial court's decision to give an instruction on felony murder, to deny his request for an instruction on a duress defense to the homicide charges, and to deny his request for an instruction on an independent act defense to Counts I and III.

(A) Felony Murder Instruction – Petitioner's Ground One

Petitioner argues that the jury instructions included both a charge concerning felony murder and a charge concerning premeditated murder, but the felony murder charge could not support a conviction on Count II for the same reasons which underlie the Florida Supreme Court's reversal of the robbery aggravating circumstance in sentencing. This evidentiary insufficiency, petitioner suggests, brings his conviction on Count II within the rule of *Stromberg v. California*, 283 U.S. 359 (1931). Accordingly, petitioner maintains his conviction must be vacated.

Petitioner's argument erroneously applies *Stromberg* to a general verdict for which the evidence is inadequate to support conviction on one of several independent grounds. The principles enunciated in *Stromberg* demand reversal of a conviction when (1) the jury is instructed that any one of the several listed grounds will warrant a guilty verdict; (2) determining on which ground the jury based its verdict is impossible; and (3) one of the listed grounds is constitutionally invalid. 283 U.S. at 368; *Adams v. Wainwright*, 764 F.2d 1356, 1361 (11th Cir. 1985). The

key for present purposes is the third element. As explained by the Supreme Court, when one listed ground is *constitutionally* infirm, the conviction must be overturned because upholding it "would be to countenance a procedure which would cause a serious impairment of constitutional rights." *Williams v. North Carolina*, 317 U.S. 287, 292 (1942). Because this kind of deprivation results, it has been held that *Stromberg* violations cannot be subjected to harmless error analysis. *See Adams*, 764 F.2d at 1362. This conclusion concerning harmless error analysis, however, is called into question by a recent Supreme Court decision. *See Rose v. Clark*, 106 S. Ct. 3101 (1986) (error in instructing jury to presume intent may be subject to harmless error analysis); *see also Chapman v. California*, 386 U.S. 18 (1967); *Quigley v. Vose*, 834 F.2d 14, 16 (1st Cir. 1987) (*Rose* trumps *Stromberg* on improper burden-shifting instructions).

The Court must distinguish, then, "between a conviction based on facts which, even if true, could not constitutionally form the basis for criminal sanctions, and a conviction based on facts which, if true, would indeed be grounds for criminal punishment but which [petitioner] claims were not proven at trial." *United States v. Dilworth*, 524 F.2d 470, 471 n.1 (5th Cir. 1975). In the former case, the Court usually cannot determine the charge upon which the jury rested its verdict. *But see Adams*, 764 F.2d at 1363. Thus, the third and second *Stromberg* elements are interdependent. The latter case, in contrast, involves an evidentiary inadequacy which the Court safely may presume the jury also recognized.

The second *Stromberg* element produces an analysis very similar to be harmless error analysis, as illustrated

in *Adams*.[24] The Eleventh Circuit panel concluded that it was "possible" (the second *Stromberg* element) to determine that the jury's verdict rested on premeditation because the felony murder theory had not been advanced at trial or argued by either counsel. *Id*. "Under these circumstances, it is not impossible to determine which ground the petitioner's conviction for first degree murder rests. The record reflects certainty that the conviction was for premeditated murder and not felony murder." *Id*.

An evidentiary inadequacy regarding one of the listed grounds may be analyzed in a like manner. The amended indictment alleged only the theory of premeditated murder. The instruction to the jury plainly directed them that the state had to prove the fact of robbery beyond a reasonable doubt and the instruction further defined the crime of robbery.[25] Moreover, contrary to

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[24] In *Adams*, the felony-murder instruction included reference to a felony statute that had been declared unconstitutional (the third *Stromberg* element) prior to the petitioner's trial. 764 F.2d at 1361.

[25] The instruction read (in relevant part):

> Now, felony murder in the first degree is defined in this way. Before you can find the defendant guilty of first degree felony murder, the State must prove the following three elements beyond a reasonable doubt: number one, that . . . Nancy Sheppard [is] dead; two, that the death occurred as a consequence of and while the defendant was engaged in the commission of . . . the crime of robbery of Nancy Sheppard; and . . . that Nancy Sheppard was killed by a person other than the defendant who was also involved in the commission or attempt to commit robbery of Nancy Sheppard, but that the defendant was present

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petitioner's argument, the prosecutor's closing argument emphasized the premeditation theory of Nancy Sheppard's death, almost to the exclusion of the felony-murder theory. Petitioner's trial counsel ably disputed the implied claim of robbery. R. 2205. The prosecutor then first explained the "robbery" in rebuttal. R. 2274-75. Thus, accepting the state supreme court finding that the evidence could not support a conviction for the felony of robbery, the Court finds the circumstances under which the jury considered the question make it possible to determine that the jury did not rest its verdict on the felony-murder theory. This finding ends the *Stromberg* challenge. *Zant v. Stephens*, 462 U.S. 862 (1983).

In the alternative, the Court finds the alleged error to be harmless. The instruction on felony-murder went to

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> and did knowingly aid, abet, counsel, hire or otherwise procure the commission of the robbery.
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> * * *
>
> For the purposes of this case, robbery is defined as the taking of money or property from the person or custody of another by force, violence or assault, by putting the victim in fear. The property taken must be of some value and at the time of the taking the defendant must have intended to permanently deprive the victim of the money or property

R. 2288-90. This instruction may be distinguished from the harmless error criticized in petitioner's memorandum on the basis that this instruction defined the underlying elements of the felony murder, while the cases cited by petitioner did not. *See Teffeteller v. State*, 439 So. 2d 840, 844 (Fla. 1983); *Knight v. State*, 394 So. 2d 997, 1002 (Fla. 1981).

the issue of intent to commit the Sheppard murder.[26] The killing took place in an isolated place, execution-style. The sole issues present in the Sheppard killing were whether petitioner voluntarily participated in the killing, and if so, whether the killing was premeditated or in the course of a robbery. In fact, this second issue can be narrowed further because the state never presented a scenario other than a premeditated killing followed by robbery. The jury was left to decide the extent of petitioner's participation, and petitioner's counsel so confined the issue in his closing remarks. R. 2243-44. To find the predicate facts to participation in the robbery on this record, the jury would have to find precisely the same predicate facts that support the premeditation theory. "[I]t would defy common sense to conclude that an execution-style killing . . . was committed unintentionally." *Rose*, 106 S. Ct. at 3108 n.10.

Accordingly, the challenge to the felony-murder instruction could be resolved by asking the question whether the jury was mislead on the intent issue. This question may be solved by application of harmless-error analysis. *See id.* at 3107-09 (applying harmless-error analysis to instructions which direct jury to presume malice). Thus, the conviction should not be set aside if a review of the whole record confidently produces the conclusion that the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 687 (1986). Framed

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[26] The instruction included this admonition: "[I]n order to convict of first degree felony murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill." R. 2289.

slightly differently, the inquiry focuses on "whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." *Connecticut v. Johnson*, 460 U.S. 73, 97 n.5 (1983) (Powell, J., dissenting); *accord Rose*, 106 S. Ct. at 3109.[27]

The Eleventh Circuit has implicitly endorsed this style of analysis for errors of the type alleged here. In *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 3333 (1986), the court of appeals used a harmless error analysis to decide the impact of an instruction shifting the burden of proof on the issue of intent. The trial judge in that case instructed on three theories of liability – malice murder, felony murder, and accomplice liability – and the jury returned a general verdict of guilty. The court of appeals granted habeas relief because the evidence and instruction could have permitted a jury finding that the petitioner merely assisted in the commission of an armed robbery which subsequently devolved into a murder committed by the prime mover in both crimes. *Id.* at 1456. This permissible conclusion led the court of appeals to examine the evidence on the intent issue and it found the evidence less than overwhelming. *Id.* at 1457. In contrast, the Eleventh Circuit has found harmless error in those instances for which overwhelming evidence of intent has been presented. *E.g., Potts v.*

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[27] The Court does not have to retrace the jury's deliberative process. Rather, the Court must determine that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same. *Pope v. Illinois*, 107 S. Ct. 1918, 1922 n.6 (1987).

Kemp, 814 F.2d 1512, 1516 (11th Cir. 1987); *Burger v. Kemp*, 785 F.2d 890, 892 (11th Cir. 1986), *aff'd*, 107 S. Ct. 3114, 3119 n.5 (1987); *Tucker v. Kemp*, 762 F.2d 1486, 1502 (11th Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 3340 (1986).

This Court's independent review of the record establishes, beyond a reasonable doubt, that the felony-murder instruction was harmless error. The jury had no need to rely on the presumption of intent that the felony-murder charge could have provided. This conclusion is consistent with the actions of the trial judge and the Florida Supreme Court, both of whom implicitly reached a similar conclusion by finding the "cold, calculated and premeditated" aggravating factor to be established beyond a reasonable doubt. *See Parker I*, 458 So. 2d at 754 (upholding factor and acknowledging standard for doing so). The Court also is entitled to presume on federal habeas review that those findings are correct. *Cabana v. Bullock*, 474 U.S. 376, 387-88 (1986).

(B) Duress Instruction – Petitioner's Ground Two

Petitioner alleges that he was entitled to an instruction regarding duress to support his defense that he participated in the homicides because he feared Groover and Long. Petitioner and respondents agree that the standard by which the refusal to grant the instruction is measured is whether the error so infected the entire trial that petitioner was deprived of his due process right to a fair trial. *Tyler v. Wyrick*, 635 F.2d 752, 753 (8th Cir. 1980).

Petitioner's argument encompasses a challenge to the correctness of the trial court's application of state law.

Petitioner claims that he was entitled to a duress instruction because duress is available as a defense for accomplices. However, petitioner does not raise a colorable claim that he should have been treated as a mere accomplice. To the contrary, the trial court (in its sentencing order) found petitioner to be an active, voluntary participant in the killings, a conclusion reiterated in the state supreme court opinion, *Parker I*, 458 So. 2d at 752-53. The factual findings concerning petitioner's culpability, made in the course of state court proceedings, are presumed correct on federal habeas review. 28 U.S.C. § 2254(d); *Cabana v. Bullock*, 474 U.S. 376, 387-88 (1986). Consequently, petitioner has no basis upon which to complain in this forum about the trial court's failure to grant the requested instruction.

(C) Independent Act Instruction – Petitioner's Ground Three

Petitioner argues that he was entitled to an instruction on Counts I and III that would recognize the independent act doctrine for felony murder. This doctrine elieves a co-felon of responsibility for a murder perpetrated by his accomplice if the acts leading to the murder are sufficiently independent of the co-felon's role in the underlying felony. Although the Florida Supreme Court thoroughly treated this issue, *Parker I*, 458 So. 2d at 752-53, petitioner alleges pervasive factual errors by the appellate court.

Petitioner's argument again goes to the issue of intent to commit murder. In this regard, both the trial court and the state supreme court made factual findings

that firmly establish petitioner's culpability. These findings are presumptively correct on federal habeas review. *Cabana*, 474 U.S. at 387-88. Petitioner's attempt to impeach these findings relies upon selective citation to testimony favorable to him. This approach does not surmount the burden which petitioner bears in challenging the trial court's refusal to grant his proposed instruction on an issue of state law. *Tyler*, 635 F.2d at 753.

VI. DISCRIMINATORY SYSTEM OF CAPITAL PUNISHMENT

Petitioner's Ground Twelve

Petitioner alleges that the death penalty is imposed unequally in Florida by reason of race. Petitioner presents a study by Professors Gross and Mauro that examines the relationship between the decision to sentence a defendant to death and the race of the homicide victim. Gross & Mauro, *Patterns of Death*, 37 Stan. L. Rev. 27 (1984). The study compares death sentences and victim race on a statewide basis in three states, including Florida. Petitioner must demonstrate, however, that the decision-maker in his case acted with discriminatory purpose, and that the purposeful discrimination had a discriminatory effect on him. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1766 (1987). The statistical evidence presented here does not satisfy either part of this burden. *Darden v. Dugger*, 825 F.2d 287, 295 (11th Cir. 1987); *Elledge v. Dugger*, 823 F.2d 1439, 1450 (11th Cir. 1987).

VII. DEPRIVATION OF *TEDDER* PROTECTIONS REGARDING JURY OVERRIDE BY SENTENCING JUDGE

Petitioner's Ground Fourteen

Petitioner asserts that the trial judge's decision to impose a sentence of death over the jury's recommendation of life imprisonment violated the protections accorded to him by *Tedder v. State*, 322 So. 2d 908 (Fla. 1975) and its progeny. Petitioner further argues that appellate review failed to correct the trial judge's error and therefore a death sentence was imposed on him in violation of the guarantees secured by the eighth and fourteenth amendments. Respondents characterize petitioner's argument as a request for resentencing in federal court, an attempt to secure federal review of a state court's application of state law. The Court disagrees with respondents, view of this Court's role and finds merit in petitioner's argument.

Petitioner appeals to the *Tedder* standard for evaluating the propriety of a judge override of a jury's recommendation of a sentence of life imprisonment. According to *Tedder*, "to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So. 2d at 910. Moreover, "a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." *Richardson v. State*, 437 So. 2d 1091, 1095 (Fla. 1983). This presumption of correctness attached to a jury's advisory verdict in favor of life has

been recognized as an important procedural right cognizable in federal habeas review.[28] *E.g., Magill v. Dugger*, 824 F.2d 879, 894 (11th Cir. 1987); *Adams v. Wainwright*, 764 F.2d 1356, 1364 (11th Cir. 1985). In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Supreme Court "recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida. . . . Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." *Id.* at 465;[29] *see Evitts v. Lucey*, 469 U.S. 387 (1985)

[28] Respondents seek to frame this issue as solely one of state law, not cognizable on federal habeas review. *See Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Wainwright v. Goode*, 464 U.S. 78, 83-84 (1983). The argument misunderstands the precedent upon which respondents rely. *See Saldana v. New York*, 665 F. Supp. 271, 276 n.8 (S.D. N.Y. 1987). Indeed, the *Pulley* Court conducted an inquiry into the nature of the state law protection claimed in that case, but found that California did not accord proportionality review to capital defendants. *See* 465 U.S. at 41-42 & n.5. Likewise, the *Goode* Court conducted an inquiry into whether the alleged violation of state law created an unreliable sentencing procedure. *See* 464 U.S. at 86-87. These inquiries are aspects of the ones undertaken in the present case.

[29] Respondents suggest that *Spaziano* has foreclosed review of this issue. They point to language stating, "there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence. . . . " 468 U.S. at 466. This citation, however, does not end this Court's inquiry. The Supreme Court indeed found no reason to doubt the conduct of appellate review by the Florida Supreme Court as of July 2, 1984. That conclusion does not imply that federal courts need never look at the issue again. In fact, *Spaziano* should be read as an instruction to the federal judiciary to determine whether the death penalty was properly imposed.

(state-created rights must be administered in accord with due process clause); *Hines v. Enomoto*, 658 F.2d 667, 672 (9th Cir. 1981) (due process right to procedure for empaneling impartial jury violated by denial to defendant of one half of peremptory challenges guaranteed by state statute).

Petitioner's counsel presented evidence at the sentencing hearing on many nonstatutory mitigating circumstances which the state supreme court previously found cognizable as matters which could reasonably support the jury's recommendation of life imprisonment. In particular, the following circumstances were developed in testimony and have previously (and subsequently as well) been given substantial weight by the Florida Supreme Court:

> (1) Petitioner suffered the effects of drug and alcohol intoxication at the time the murders were committed. *E.g., Masterson v. State*, 516 So. 2d 256, 258 (Fla. 1987); *Fead v. State*, 512 So. 2d 176, 178-79 (Fla. 1987); *Norris v. State*, 429 So. 2d 688, 690 (Fla. 1983); *Kampff v. State*, 371 So. 2d 1007, 1008 (Fla. 1979); *Buckrem v. State*, 355 So. 2d 111, 113 (Fla. 1978).
>
> (2) Petitioner's accomplices and codefendant received lesser sentences for their parts in the Sheppard murder. *E.g., Downs v. Dugger*, 514 So. 2d 1069, 1072 (Fla. 1987); *Brookings v. State*, 495 So. 2d 135, 142 (Fla. 1986); *Hawkins v. State*, 436 So. 2d 44, 47 (Fla. 1983); *Stokes v. State*, 403 So. 2d 377, 378 (Fla. 1981); *Malloy v. State*, 382 So. 2d 1190, 1193 (Fla. 1979).

This list is not exhaustive of petitioner's arguments, but it serves to illustrate the extent to which nonstatutory mitigating circumstances in petitioner's case could have exercised influence on the jury's recommendation of life imprisonment. The failure of the trial court to find the

presence of nonstatutory mitigating circumstances which are fairly supported by the record renders the death sentence unconstitutional and invalid. *Magwood v. Smith*, 791 F.2d 1438, 1449-50 (11th Cir. 1986). The record before the Court could fairly support a finding on these nonstatutory circumstances by a reasonable jury. *Cf. Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (on habeas review, evidence is sufficient to support jury verdict unless no rational trier of fact could have found that proof as adduced in record supported verdict at appropriate standard of proof). The trial judge made no findings on the proffered nonstatutory mitigating circumstances, so the state supreme court's reliance on the trial judge's finding regarding mitigation cannot be said to include these factors.[30]

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[30] The opinion in *Parker I* does not indicate clearly whether the Florida Supreme Court independently scrutinized the record for the presence or absence of nonstatutory mitigating circumstances:

> The trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied. In light of these findings the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty has been found appropriate.

458 So. 2d at 754 (citations omitted). *Compare Thompson v. State*, 456 So. 2d 444, 447 (Fla. 1984) ("From our review of the record we find that there were mitigating circumstances on which the jury could have properly relied and which could have reasonably persuaded the jury to advise life imprisonment.").

The trial judge's failure to address the nonstatutory mitigating circumstances also raises a *Hitchcock*[31] concern with this Court. The sentencing order enumerates the statutory mitigating circumstances, dismissing their application, but is silent on the issue of nonstatutory mitigating circumstances. *See Lewis v. State*, 398 So. 2d 432, 438-39 (Fla. 1981) (sentencing order in this form does not properly account for jury's right to evaluate nonstatutory mitigating circumstances). This silence must be contrasted to the judge's statement in open court that the sentencing order addresses all aggravating and mitigating circumstances. R. 2576. If the guarantee for consideration of (rather than mere presentation of) nonstatutory mitigating circumstances is to be given any meaning, then the trial judge must accord those circumstances weight as a reasonable basis for a jury's recommendation of life imprisonment. *Cf. Clark v. Dugger*, 834 F.2d 1561, 1569-70 (11th Cir. 1987) (holding *Hitchcock* error to be harmless error because *no* nonstatutory mitigating evidence was presented at sentencing hearing); *Magill v. Dugger*, 824 F.2d 879, 893 (11th Cir. 1987) (weight accorded jury's recommendation for life imprisonment dictates that resentencing after *Hitchcock* error involving advisory jury must include advisory jury).

Petitioner's argument is well taken despite the state supreme court's affirmance of *four* statutory aggravating factors. This ruling should be viewed in the light of the trial judge's imposition of a life sentence on petitioner for the Padgett murder (in accord with the jury's recommendation) although he found *five* aggravating factors and no

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[31] *Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987).

mitigating circumstances.[32] The obvious distinction, a perceived difference in the victims, is not constitutionally permissible.[33] Moreover, the Florida Supreme Court has not hesitated to reverse a jury override sentence of death even when four aggravating factors are validated after appeal. *E.g., Masterson v. State*, 516 So. 2d 256, 258 (Fla. 1987); *Richardson v. State*, 437 So. 2d 1091, 1095 (Fla. 1983); *Welty v. State*, 402 So. 2d 1159, 1164 (Fla. 1981); *Neary v. State*, 384 So. 2d 881, 885 (Fla. 1980); *Brown v. State*, 367 So. 2d 616, 625 (Fla. 1979).

[32] The aggravating factors for the two murders substantially overlap. The sentencing order listed one aggravating factor for the Sheppard murder, that it was committed to avoid lawful arrest for the Padgett murder, which was not present in the Padgett murder. The Florida Supreme Court's reasons for invalidating two of the aggravating factors in the Sheppard murder do not apply to those same factors for the Padgett murder.

[33] The sentencing order repeatedly makes reference to Ms. Sheppard in particularly sympathetic terms, such as "the innocent and unsuspecting young Nancy" and "the helpless 17 year old girl." The trial judge, perhaps understandably, was drawing a distinction in what he perceived to the heinousness of the killings based on a difference between the victims. The Constitution, however, does not countenance distinctions of this nature. *Booth v. Maryland*, 107 S. Ct. 2529, 2534 n.8 (1987). The Court further notes that the proceeding before the judge included testimony not presented to the advisory jury on the subject of the victims, families views regarding the appropriate sentence. This testimony also offends federal constitutional guarantees. *See id.* at 2535-36; *Patterson v. State*, 513 So. 2d 1257, 1263 (Fla. 1987). Notably, petitioner's counsel interposed a timely objection to the relevance of receiving the victim impact testimony. R. 2534-35.

The trial judge must address several issues if the state chooses to seek a resentencing hearing for petitioner. Given the state of the record at this point, the judge must explain why the Sheppard murder, for which four aggravating factors have been allowed by the state supreme court, should be punished by death when the judge has already determined that the Padgett murder, for which five aggravating factors were found by the judge at petitioner's original sentencing, is punished by life imprisonment.[34] Moreover, the judge must determine whether petitioner has established (to the level of proof demanded by state law) the presence of nonstatutory mitigating factors and, if so, whether those factors provide a reasonable basis for the jury's recommendation of life.[35] Finally, the judge must decide if petitioner's offense, in the light of aggravating and mitigating circumstances, falls within the class of offenses deserving of a sentence of death. Succinctly stated, the judge must apply the *Tedder* standard with an eye to how that standard is applied statewide. This Court expresses no opinion on what outcome this process will produce; only the judge brings to the process the experience and judgment which is integral to Florida's capital sentencing scheme. The Constitution simply demands that this process be performed in a reliable and consistent manner.

The appropriate remedy is, of course, to set aside the death sentence. Since no problem is apparent in the

[34] The judge should be cognizant of the constitutional concerns raised *supra* note 33.

[35] The *Hitchcock* concerns raised *supra* also should be addressed.

procedure held before the advisory jury, the writ should be granted conditionally, with the state affording petitioner a resentencing hearing, *Magwood*, 791 F.2d at 1450, before a judge, based on the recommendation of the advisory jury from petitioner's original sentencing, *see Menendez v. State*, 368 So. 2d 1278, 1282 (Fla. 1979), and whatever additional relevant, constitutionally permissible evidence the judge may deem fit to receive. In the alternative, the judge may vacate the death sentence and impose a lesser sentence consistent with law.

Accordingly, it is ORDERED AND ADJUDGED:

1. That the Petition for Writ of Habeas Corpus is hereby denied as to the convictions;

2. That the Petition for Writ of Habeas Corpus is hereby granted as to the imposition of the death penalty sentence;

3. That petitioner shall remain in the custody of the Superintendent of the Florida State Prison, Starke, Florida; and

4. That the State of Florida shall have one hundred and twenty (120) days within which to afford petitioner a resentencing hearing before a sentencing judge or to vacate the death sentence and impose a lesser sentence consistent with law.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 26th day of February 1988.

/s/ Howell W. Melton
UNITED STATES DISTRICT JUDGE

United States Court of Appeals,
Eleventh Circuit.

**Robert Lacy PARKER,
Petitioner-Appellee,
Cross-Appellant,**

v.

Richard L. DUGGER, Secretary, Florida Department of Corrections, and Robert A. Butterworth, Attorney General, State of Florida, Respondents-Appellants, Cross-Appellees.

No. 88-3189.

June 19, 1989.

Before TJOFLAT, FAY and VANCE, Circuit Judges.

VANCE, Circuit Judge:

This is an appeal from the district court's judgment granting Robert Lacy Parker's petition for habeas corpus relief. We reverse.

I. FACTS

This case involves three murders committed in Duval County, Florida on February 6-7, 1982.[1] Parker, then a drug dealer, was known to have a violent temper and to possess several firearms. The day the murders began, Parker became irritated because many of his customers

[1] The facts were taken from the trial judge's written findings of fact as contained in his sentencing order. Parker does not allege the presence of any of the eight grounds for challenging these factual findings that are listed in 28 U.S.C. § 2254(d); therefore, the state trial judge's factual findings are presumed correct.

were not paying their accounts. He decided to reinforce his reputation as a tough dealer and began by throwing a rope over a tree limb and threatening to hang Tommy Groover, one of his distributors, if the debts were not paid. The next day Parker again threatened to kill Groover if he did not recover the money. Taking Parker at his word, Groover set out with Billy Long, another of Parker's acquaintances, to collect some of the debts. They first stopped at a local nightclub. There they found Richard Padgett, who was behind in his drug debts, with his girlfriend, Nancy Sheppard. The two men persuaded Padgett and Sheppard to accompany them to Parker's trailer, where Parker and his ex-wife, Elaine Parker, were waiting.

When the group arrived at the trailer, Parker took Padgett outside for a "discussion." A shot was fired. When the two came back inside, Parker had a pistol in his belt. Sheppard became alarmed and offered her necklace and ring to Parker as payment for Padgett's debt. Parker refused Sheppard's offer; instead, Long drove her home. The rest of the group accompanied Padgett as he tried to collect money to pay his debt. When he was unsuccessful, Padgett was taken to a junkyard owned by Parker's father. At the junkyard, Groover beat Padgett. Thereafter, the group drove to a secluded rural area. The three men exited the car and Padgett fell to his knees and begged for mercy. With Parker's aid, Groover shot Padgett to death and Parker and Groover threw his body in a ditch.

Parker, Groover, and Elaine cleaned up at the junkyard and drove to a bar where they met Jody Dalton, Groover's former girlfriend. Ms. Dalton decided to accompany them. The group first stopped to throw the

murder weapon into a river. Dalton witnessed this act. Next, they returned to Parker's trailer and dropped Dalton off while the rest of the group drove to the residence of Joan Bennett. When they returned with Ms. Bennett, Parker became angry because Dalton had used some of his drugs without his permission. Parker and Groover decided to "get rid" of Dalton and drove the entire group to an area known as Donut Lake. There Dalton was stripped, taunted, beaten, and kicked as she begged for mercy. Groover again with Parker's aid, shot Dalton to death. The two men tied up her body with rope and concrete blocks and threw it into the lake.

During the trip back, Parker and Groover discussed killing Bennett because she had witnessed the Dalton murder. Elaine convinced the two men that Bennett could be trusted and they drove Bennett home. The three concluded, however, that Sheppard could link them to Padgett's murder and decided to kill her. They first found Long, who directed them to Sheppard's home. Elaine then tricked Sheppard into accompanying the group by telling her that Padgett was "high" and wanted to see her.

The group soon arrived at the scene of the Padgett murder. Parker took Long to the ditch and asked him if he knew what was going on. When he replied that he did not. Parker told him that "either you kill Nancy or I will kill you."[2] Next, Parker took Sheppard to the ditch. Upon seeing Padgett's body, she fell to the ground and exclaimed "Oh, my God!" Elaine handed Long a pistol

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[2] Long had good reason to fear Parker; Parker had been imprisoned once for shooting Long.

and said, "You better do it or he'll kill you too." Long took the pistol and shot Sheppard in the head. Parker and Groover screamed, "Shoot her again, she's still breathing." Long shot her twice more. Parker than cut her throat with a knife and took her necklace and ring.

II. PROCEDURAL HISTORY

The State of Florida charged Parker by amended indictment with three counts of first degree murder. Count one charged Parker for the murder of Padgett, count two for the murder of Sheppard, and count three for the murder of Dalton. Parker and Groover were tried separately. Parker's trial began on February 28, 1983. Long and Bennett, among others, testified against Parker. Parker also testified, claiming that Groover orchestrated the murders and had threatened to harm Parker's family if he did not cooperate. The jury rejected this version of the facts and on March 9, 1983, found Parker guilty of first degree murder for the deaths of Padgett and Sheppard and third degree murder for the death of Dalton.

During the sentencing phase the state presented evidence of statutory aggravating circumstances, *see* Fla.Stat.Ann. § 921.141(5) (West 1985), and Parker presented evidence of both statutory mitigating circumstances, *see id.* § 921.141(6), and nonstatutory mitigating circumstances. The evidence presented by Parker included the testimony of six witnesses (his mother, grandmother, neighbor, cousin, sister, and minister), each testifying to some redeeming qualities in Parker's character.

The jury recommended that Parker receive life sentences for the murders of Padgett and Sheppard. The trial judge overrode the jury's recommendation as to count two, the murder of Sheppard, and sentenced Parker to death. The judge wrote detailed findings as to the statutory mitigating and aggravating circumstances present during the murder. He found no statutory mitigating circumstances[3] and six statutory aggravating circumstances.[4]

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[3] The trial judge expressly found that the following statutory mitigating circumstances, as specified in Fla.Stat.Ann § 921.141(6) (1985), were either not present or carried no weight:

> (a) The defendant has no significant history of prior criminal activity.
>
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's conduct or consented to the act.
>
> (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> (g) The age of the defendant at the time of the crime.

[4] The trial judge found the following statutory aggravating circumstances to be presented:

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Parker appealed and the Florida Supreme Court affirmed. *Parker v. State*, 458 So.2d 750 (Fla.1984), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985) [hereinafter *Parker I*]. The court held that the trial judge had erred in finding that two of the statutory aggravating circumstances were present.[5] The court nevertheless held that the remaining four statutory aggravating circumstances sufficiently outweighed the mitigating circumstances to justify the trial court's decision to override the jury's recommendation. The court specifically held that the trial judge's override complied with the standard

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(1) Parker was previously convicted of a felony involving the use of or threat of violence to the person.

(2) The capital felony was committed while Parker was engaged, or was an accomplice, in the commission of, or an attempt to commit, a robbery.

(3) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

(4) The capital felony was committed for pecuniary gain.

(5) The capital felony was especially heinous, atrocious, or cruel.

(6) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

See id. § 921.141(5).

[5] The court held that the murder of Sheppard was not committed during a robbery, nor was it especially heinous, atrocious, or cruel, *Parker I*, 458 So.2d at 754.

announced in *Tedder v. State*, 322 So.2d 908 (Fla.1975), which mandates that a trial judge may override a jury's recommendation of life only when "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Id.* at 910, *cited in Parker I*, 458 So.2d at 754.

Parker thereafter moved under Fla.R.Crim.P. 3.850 to vacate the judgment and sentence. The trial judge denied the motion and the Florida Supreme Court affirmed. *Parker v. State*, 491 So.2d 532 (Fla.1986) [hereinafter *Parker II*]. Parker then filed a federal habeas petition. The court considered and rejected twelve grounds for relief,[6] but

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[6] The district court considered and rejected the following grounds asserted by Parker: (1) His conviction for murdering Sheppard was obtained by instructing the jury on a theory of liability, the felony-murder rule, that was unsupported by the evidence. (2) The trial judge improperly refused to grant Parker's requested jury instruction as to the Sheppard count that duress is a defense to felony-murder. (3) The trial judge improperly refused to grant Parker's requested jury instruction that he could not be found guilty of murdering Padgett and Dalton if the murders were the independent acts Groover. (4) The prosecution failed to reveal evidence favorable to the defense in the form of payments to state witnesses, despite repeated requests by the defense for this evidence, and actively denied its existence during trial. (5) The prosecution repeatedly made improper, prejudicial, and inflammatory remarks during the guilt phase summations. (6) The prosecution improperly introduced evidence of collateral acts and crimes of Parker solely to demonstrate Parker's propensity to commit crime. (7) The prosecution improperly cross-examined Parker about his conversations with is trial counsel. (8) The trial judge improperly prohibited Parker from showing the bias of a state witness by questioning her about her probationary status. (9)

(Continued on following page)

granted relief on one ground. Respondents appeal and Parker cross appeals.

III. RESPONDENTS' APPEAL

The district court granted relief on the following ground raised in Parker's habeas petition:

> The Florida Supreme Court has adopted such a broad and vague construction of the *Tedder* standard of review of jury overrides as to result in the arbitrary, capricious, and disproportionate application of the death penalty.

Respondents contend that the district court erred. We agree.

In *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Supreme Court exhaustively examined the constitutionality of Florida's override scheme. The Court first examined the constitutionality of schemes in which a trial judge may impose the death penalty alone, without any input from a jury. *Id.* at 457-65, 104 S.Ct. at 3160-65. After concluding that such

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The prosecution intentionally elicited testimony from a defense witness that Parker had remained silent while in jail. (10) The state offered into evidence statements made by Parker after arrest and without benefit of *Miranda* warnings. (11) The trial judge improperly allowed into evidence statements made by Parker during an arrest for an unrelated crime and instructed the jury that the statements could be used as evidence of Parker's guilt in the present case. (12) The State of Florida imposed Parker's death sentence pursuant to a pattern of racial discrimination.

schemes are not *per se* unconstitutional, the Court likewise concluded the schemes in which the trial judge may impose the death penalty after receiving an advisory verdict of life from a jury are not *per se* unconstitutional. *Id.* at 465, 104 S.Ct. at 3165.

The Court then examined the particular override scheme used by the State of Florida and concluded that, in general, Florida's scheme is constitutional. The Court was persuaded by two aspects of the scheme that render it unlikely that the Florida courts will impose the death penalty in an arbitrary or discriminatory manner. First, several Florida procedural rules, of both statutory and case law origin, constrain trial judges from imposing the death penalty in an arbitrary or discriminatory manner. Among these significant safeguards is § 921.141(3) of the Florida Statutes, which requires trial judges to independently review the evidence and make detailed written findings regarding aggravating and mitigating circumstances before imposing the death penalty. *Spaziano*, 468 U.S. at 466, 104 S.Ct. at 3165. Another significant safeguard accorded capital defendants is the *Tedder* standard. *Id.* at 465, 104 S.Ct. at 3165. Second, the meaningful appellate review by the Florida Supreme Court in every capital case further reduces the likelihood that the death penalty will be imposed in an arbitrary or discriminatory manner. That court is required by law to review every death sentence to ensure that it has not been imposed arbitrarily or capriciously. *Id.* at 466, 104 S.Ct. at 3165 (citing Fla.Stat. § 921.141(4)). The Court noted that there has been no evidence that the Florida Supreme Court has failed to execute its responsibility faithfully, *id.* at 466, 104 S.Ct. at 3165, or hesitated to reverse a trial judge who has

derogated the jury's role by failing to comply with the mandates of *Tedder, id.* at 465, 104 S.Ct. at 3165. Thus, not only are Florida trial judges provided with procedural rules to aid them in performing their duty in a constitutional manner, the likelihood that they will succeed in ignoring these rules or incorrectly following them is reduced significantly by meaningful appellate review.

The Court's conclusion that Florida's override scheme is constitutional did not end its inquiry. Procedures that result in the constitutional application of the death penalty if followed correctly may result in the unconstitutional application of the death penalty if followed incorrectly. The Court therefore examined the record of the particular case before the Court and concluded that the application of Florida's scheme did not result in the arbitrary or discriminatory application of the death penalty. *See id.* at 466, 104 S.Ct. at 3165 ("We see nothing that suggests that the application of the jury-override procedure has resulted in the arbitrary or discriminatory application of the death penalty, either in general *or in this particular case.*") (emphasis added).

As in *Spaziano*, the present case involves the application of Florida's override scheme. Because the Court in *Spaziano* upheld the general constitutionality of the scheme, we need not re-examine this issue. Rather, we must examine the application of these procedures in this case. We conclude that the application of Florida's override scheme in the present case did not result in the arbitrary or discriminatory imposition of the death penalty.

The district court decision suggests that its grant of relief was influenced by dissatisfaction with the Florida Supreme Court's application of the *Tedder* standard to the facts in this case. *Spaziano* warns, however, that federal review for the arbitrary or discriminatory imposition of the death penalty must not devolve into second-guessing the Florida courts on question of state law, particularly on whether the trial judge complied with the mandates of *Tedder*:

> Our responsibility . . . is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.

Spaziano, 468 U.S. at 465, 104 S.Ct. at 3165. The district court's opinion characterized the ground upon which it granted relief as alleging "that the trial judge's decision to impose a sentence of death over the jury's recommendation of life imprisonment violated the protections accorded to him by *Tedder v. State* and its progeny." The fact that the court interpreted this to be issue before it, and granted relief in response, suggests that the court granted habeas relief for the wrong reason.

We nevertheless must uphold the district court's decision if the record supports the conclusion that the death penalty was imposed in an arbitrary or discriminatory manner. Nothing in the record, however, supports such a conclusion. The district court noted that the trial judge did not make specific written findings with respect to the presence of nonstatutory mitigating circumstances and interpreted this silence as manifesting a conclusion that nonstatutory mitigating circumstances were not present. The court held that the presence of nonstatutory

mitigating circumstances was fairly supported by the record and therefore the failure to find the presence of such circumstances rendered Parker's death sentence invalid. *See Magwood v. Smith*, 791 F.2d 1438, 1449-50 (11th Cir. 1986) (cited in district court's opinion). Our court, however, has rejected the theory that a trial judge's failure to make specific written findings concerning nonstatutory mitigating circumstances raises the inference that he did not *consider* such evidence in reaching the decision to impose the death penalty. *See Johnson v. Wainwright*, 806 F.2d 1479, 1484 n. 8 (11th Cir.1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 205, 98 L.Ed.2d 157 (1987).[7] In

[7] The district court also expressed the concern that the trial judge's silence indicated that he did not consider nonstatutory mitigating circumstances before deciding to override the jury's recommendation of life and therefore he may have violated *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). We first note that Parker did not raise a *Hitchcock* allegation in his habeas petition. In any event, *Johnson v. Wainwright* answers these concerns. We also note that the trial judge prefaced his written findings with the following statement:

> [T]his Court has carefully studied and considered all the evidence and testimony at trial and at advisory sentence proceedings, the Presentence Investigation Report, the applicable Florida Statutes, *the case law, and all other factors touching upon this case.*

(emphasis added). The trial of this case occurred after *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (requiring consideration of nonstatutory mitigating circumstances), was decided and Fla.Stat. § 921.141 was amended to require Florida trial courts to consider nonstatutory mitigating circumstances. Given this and the fact that the trial judge listened to

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addition, no inference can be drawn from the trial judge's silence that he did not *find* nonstatutory mitigating circumstances to be present. Under the facts of this case the only reasonable conclusion is that the trial judge found at least some mitigating factors to be present, but also found that they were *outweighed* by the aggravating factors also present. In his sentencing order, the judge wrote that "[t]here are no mitigating circumstances that *outweigh* the aggravating circumstances in . . . the second count (Sheppard murder)." (emphasis added)

The district court also noted that the Florida Supreme Court has overturned jury overrides in other cases in which more statutory aggravating circumstances were present than in this case. Under Florida law, however, the sentencing process in capital cases is more than a simple calculation of the number of aggravating circumstances:

> [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 195 (1974). The federal

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copious evidence of nonstatutory mitigating circumstances presented by Parker during the sentencing phase, we are convinced that the trial judge did in fact consider and weigh nonstatutory mitigating circumstances before deciding to sentence Parker to death.

constitution does not require that it should be. *See Barclay v. Florida*, 463 U.S. 939, 950, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983) ("We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors."); *see also Spaziano*, 468 U.S. at 466, 104 S.Ct. at 3165 (jury override upheld even though only two aggravating factors present). The fact that there were "only" four statutory aggravating circumstances present during the Sheppard murder hardly compels the conclusion that the death penalty was imposed in an arbitrary or discriminatory manner.

Another concern of the district court was that the trial judge imposed a sentence of death for the murder of Sheppard but not for the murder of Padgett. The court concluded that the different sentences resulted from a perceived difference in the victims. The court reached this conclusion because the trial judge, in his sentencing order, referred to Sheppard in sympathetic terms as "the innocent and unsuspecting young Nancy" and "the helpless 17 year old girl." We think it is unreasonable to assign a discriminatory motive to a trial judge merely because he referred to the victim of a brutal murder in sympathetic terms. Trial judges cannot be expected to divorce from themselves all human emotion merely because a trial is at hand. As the Supreme Court stated in *Barclay*, "[i]t is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences." *Barclay*, 463 U.S. at 950, 103 S.Ct. at 3425. The district court's

conclusion also ignores at least three aggravating circumstances present during the Sheppard murder that were not present during the Padgett murder: (1) the Sheppard murder was the third murder that day, while the Padgett murder was the first, (2) Parker cut Sheppard's throat to make sure the job was done, and (3) he murdered her to prevent her from identifying him as the murderer of Padgett. The evidence supports our conclusion that the trial judge gave Parker different sentences because the totality of the circumstances surrounding the two murders were different, rather than because of a perceived difference in the victims.

A state imposes punishment arbitrarily "when, without reason, if (sic) inflicts upon some people a severe punishment that it does not inflict upon others." *Furman v. Georgia*, 408 U.S. 238, 274, 92 S.Ct. 2726, 2744, 33 L.Ed.2d 346 (1972) (Brennan J., concurring). A state imposes punishment in a discriminatory manner when "it discriminates against [the defendant] by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Id.* at 242, 92 S.Ct. at 2728 (Douglas, J., concurring). We have reviewed the record and conclude that the imposition of the death penalty in this case falls into neither category.

IV. THE CROSS APPEAL

Parker contends that the district court erred in concluding that eleven of his grounds for habeas relief have no merit.[8]

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[8] Parker does not challenge the district court's holding that habeas ground twelve has no merit. *See supra* note 6.

A. Procedural Bar

One of these grounds is a claim under *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).[9] Respondents contend that this claim is procedurally barred from federal habeas review. We agree. A defendant who is procedurally barred in state court from raising a federal constitutional claim also is barred from raising the same claim in a federal habeas petition unless he can show cause for and actual prejudice from making the default. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The record reflects that Parker did not raise a *Stromberg* claim before the original trial court or on direct appeal to the Florida Supreme Court. He also did not raise the claim in his Rule 3.850 motion to the trial court or in his appeal to the Florida Supreme Court of the denial of the motion. Parker does not dispute that the failure to present the *Stromberg* claim to the Florida courts[10] constitutes procedural default under Florida law,

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[9] Habeas ground one. *See supra* note 6. Although Parker's habeas petition does not specifically cite *Stromberg* under habeas ground one. Parker argued this ground as a *Stromberg* violation in his brief to this court.

[10] Parker asserts that he raised a *Stromberg* claim in his petition for rehearing of his direct appeal to the Florida Supreme Court. We have examined Parker's petition for rehearing and conclude that he in fact did not present a *Stromberg* claim in his petition for rehearing.

Even if Parker had argued a *Stromberg* claim in the motion for rehearing of the direct appeal, we would conclude that the claim is procedurally barred from federal habeas review. After failing to raise the claim on direct appeal, Parker also failed to raise it in his subsequent Rule 3.850 motion. His failure to do

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nor does he attempt to show justifiable cause for making the default. He instead attempts to rely on an exception to the rule of procedural bar to the effect that the rule does not apply if the state courts have chosen not to enforce their own procedural default rule by deciding a claim on its merits. *See Dobbert v. Strickland*, 718 F.2d 1518, 1524 (11th Cir. 1983), *cert. denied*, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 887 (1984).

Parker first points to language from the Florida Supreme Court's opinion disposing of his direct appeal, in which the court stated that "[i]n addition to considering all other issues raised on appeal, we have conducted an independent review of the record o[f] trial and find no reason to award a new trial." *Parker I*, 458 So.2d at 754. We do not agree that the supreme court thus indicated that it not only had chosen to decide the claims that were presented to the court on their merits, but also all conceivable claims that might have been presented to the court. Fla.R.App.P. 9.140(f) requires that "[i]n capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not

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so constitutes procedural default under Florida law. *See Delap v. State*, 513 So.2d 1050 (Fla.1987). When a claim is procedurally barred because the defendant failed to raise the claim to the last state court rendering a judgment in the case, the state court cannot be held to have waived the procedural default, even in the absence of a plain statement indicating that procedural default was not waived. *See Harris v. Reed*, ___ U.S. ___, ___-___, 109 S.Ct. 1038, 1046-48, 103 L.Ed.2d 308 (1989) (O'Connor, J., concurring). Thus, we conclude that the Florida Supreme Court, in disposing of the Rule 3.850 motion, did not waive procedural default as to the *Stromberg* claim.

insufficiency of the evidence is an issue presented for review." With the exception of challenges to the sufficiency of the evidence, we cannot accept the contention that the Florida Supreme Court would interpret Rule 9.140(f) as obviating, for capital defendants, the traditional requirement that appellants must present to the reviewing court all issues for which relief is sought.

Parker cites *Harris v. Reed*, ___ U.S. ___, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), for the proposition that, despite his failure to present a *Stromberg* claim to the Florida courts, we must presume that those courts chose to ignore the procedural default because they have never "plainly stated" that Parker's *Stromberg* claim is procedurally barred. As applied in this case, however, *Harris* does not stand for such a proposition.

The defendant in *Harris* raised an ineffective assistance of counsel claim in a petition for postconviction relief before the state trial court. *Id.* at ___, 109 S.Ct. at 1040. The trial court denied the claim and the Appellate Court of Illinois affirmed in an unpublished decision in which it noted that the defendant had not raised an ineffective assistance claim in his previous direct appeal to the appellate court and that it was a "well-settled" principle of Illinois law that " 'those issues which could have been presented [on direct appeal], but were not, are considered waived.' " *Id.* The court nonetheless went on to consider and reject the defendant's ineffective-assistance claim on its merits. *Id.*

Although it was unclear in *Harris* whether the Appellate Court of Illinois rejected the petitioner's claim for procedural reasons or on its merits, there was no doubt

that the claim was presented to the court and therefore the court had the opportunity to reject the claim for procedural reasons. After analyzing the competing policy considerations at stake, the United States Supreme Court held that federal habeas courts must presume that, in the absence of a plain statement to the contrary, the state court elected to waive procedural default and decide, on its merits, any claim presented to the court:

> [A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case " 'clearly and expressly' " states that its judgment rests on a state procedural bar.

Id. at ___, 109 S.Ct. at 1043 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985)).

When a claim was never *presented* to the state courts, however, as in the present case, the policy considerations discussed in *Harris* render it unreasonably to presume that the state courts waived procedural default. Justice O'Connor, in her concurring opinion in *Harris*, analyzed this situation in detail and reached the same conclusion:

> [It] would make no sense . . . [to] require a "plain statement" indicating state reliance on a procedural bar where no state court was ever given the opportunity to pass on either the procedural posture or the merits of the constitutional claim.

Id. at ___, 109 S.Ct. at 1047 (O'Connor, J. concurring). We find Justice O'Connor's rationale persuasive and

therefore conclude that Parker's *Stromberg* claim is procedurally barred from federal habeas review.[11]

B. Requested Instructions

Parker contends that he is entitled to habeas relief because his requests for certain jury instructions were denied.[12] He first asserts that he was entitled to the following instruction, which proposed the duress defense to the Sheppard murder:

> One of the defenses asserted in this case is that the defendant participated in the alleged offense under duress; that is, that he was forced to participate in the offense alleged. In order to constitute a defense, the co-ercion or duress must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done.
>
> It is assumed that every person's actions are free from duress, absent evidence to the contrary. However, once some evidence of duress has been brought before the jury, the burden is upon the State to prove beyond a reasonable doubt that the defendant did not act under duress.

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[11] We also conclude that dismissing Parker's petition for failure to exhaust administrative remedies is not appropriate. *See Harris*, ___ U.S. at ___, 109 S.Ct. at 1047 (O'Connor, J. concurring) ("[D]ismissing . . . petition for failure to exhaust state court remedies would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him") (citation omitted).

[12] Habeas grounds two and three. *See supra* note 6.

Parker argues that the trial judge erred as a matter of Florida law in denying this instruction and cites several federal cases holding that a state trial judge can violate a defendant's right to due process by committing an error of state law in denying a requested jury instruction. *See, e.g., United States ex rel. Reed v. Lane*, 759 F.2d 618 (7th Cir.1985), *cert. denied*, 475 U.S. 1048, 106 S.Ct. 1268, 89 L.Ed.2d 577 (1986).

Parker asserts that the state relied on the felony murder doctrine to obtain his conviction for murdering Sheppard. He also argues that under Florida law duress is a defense to felony murder and therefore he was entitled to have the instruction delivered. We need not decide whether these assertions are correct because the state also relied on an intentional murder theory to obtain Parker's conviction. Under Florida law, duress is not a defense to intentional murder. *Wright v. State*, 402 So.2d 493, 498 (Fla.Dist.Ct.App.1981); *Cawthon v. State*, 382 So.2d 796 797 (Fla.Dist.Ct.App.), *petition for rev. denied*, 388 So.2d 1110 (Fla.1980). The requested instruction therefore is misleading because it implies that duress is a defense to either felony murder *or* intentional murder. A Florida trial judge does not err by refusing to give an erroneous instruction. *Barwicks v. State*, 82 So.2d 356, 358 (Fla.1955); *Halfrich v. State*, 165 So. 285, 288-89 (Fla. 1936). Consequently, we concluded that the trial judge properly denied the requested instruction under Florida law and correspondingly did not violate Parker's right to due process.

Parker also contends that he was entitled a jury instruction that he could not be found guilty of murdering Padgett if the killing was the independent act of Groover. The Florida Supreme Court, on direct appeal,

rejected this contention because it did not find any evidence on the record that would support the instruction. *See Parker I*, 458 So.2d at 752. The district court, citing *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), held that this conclusion is presumed to be correct.

The district court misinterpreted *Cabana*. That case held that a federal court reviewing a case for a violation of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death penalty may not be imposed on one who has neither killed, attempted to kill, or intended that a killing take place or lethal force be employed), must not focus exclusively on the instructions given to the jury. *Cabana*, 474 U.S. at 387, 106 S.Ct. at 697. Rather, the court must examine the entire course of the state proceedings to determine whether the requisite factual finding as to the defendant's culpability has been made. *Id*. If it has, the finding must be presumed correct by virtue of 28 U.S.C. § 2254(d) unless the habeas petitioner can bear the heavy burden of overcoming the presumption. *Id*. at 387-88, 106 S.Ct. at 697-98.

Under *Cabana*, therefore, findings by state judges sometimes may cure deficient jury instructions concerning the sentence a defendant is to receive. As the Court carefully noted, however, findings by state judges cannot cure deficient jury instruction concerning the elements of the crime itself:

> Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime.

Id. at 384-85, 106 S.Ct. at 696. Consequently, the direct court erred in presuming the correctness of the Florida Supreme Court's finding that the evidence was insufficient to support an independent act instruction. We nevertheless have independently reviewed the record and have determined that the evidence was insufficient to support an independent act instruction. The district court therefore did not err in refusing habeas relief on this ground.

C. Remaining Issues

The remaining issues Parker raises on appeal warrant little discussion. Three of these issues relate to conduct by the prosecution.[13] First, Parker alleges that the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose evidence favorable to the defense. The district court, applying the three-part test of *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985), found that there was not a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. We have examined the record and conclude that this finding is not erroneous. Second, Parker alleges that the prosecution violated Parker's constitutional right to counsel by asking him during cross-examination whether he had been coached by his counsel during a recess. Subject to the control of the trial judge, however, the prosecution may cross-examine a defendant as to the extent of any coaching that may have occurred during a recess. *Geders v. United States*, 425 U.S. 80, 89, 96

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[13] Habeas grounds four, five, and seven. *See supra* note 6.

S.Ct. 1330, 1336, 47 L.Ed.2d 592 (1976). Third, Parker alleges that several remarks made by the prosecution were improper, prejudicial, and inflammatory. We agree with the district court that the comments were invited by defense counsel's own heated comments during opening summation. The district court summed it up correctly:

> [T]he rhetoric from both sides was a lively exchange, often heated in the choice of words. The jury, properly instructed, can be expected to have understood the weight to accord the arguments. Petitioner's trial may not have been perfect, but due process does not depend upon perfection.

The evidence of guilt was overwhelming in this case and the trial judge cautioned the jury not to use the arguments of counsel as evidence. We are convinced that the prosecution's comments did not " 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2472, 91 L.Ed.2d 144 (1986) (citation omitted).

Parker's final contentions concern several evidentiary rulings by the trial judge[14] Parker is not entitled to habeas relief unless the rulings denied him a fundamentally fair trial. *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir1984), *cert. denied* 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). We have reviewed the record and

[14] Habeas grounds six, eight, nine, ten, and eleven. *See supra* note 6.

agree with the district court that the alleged errors neither individually nor cumulatively rendered Parker's trial fundamentally unfair.

V. CONCLUSION

Our review of the record reveals that Parker was not deprived on his constitutional right to a fair trial. The district court's judgment granting Parker habeas corpus relief therefore is

REVERSED.

SUPREME COURT OF THE UNITED STATES

No. 89-5961

Robert Lacy Parker,

Petitioner

v.

Richard L. Dugger, Secretary, Florida Department of Corrections, et al.

ON PETITION FOR WRIT OF CERTIORARI TO THE United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 28, 1990

Supreme Court, U.S.
FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-5961

In The

Supreme Court of the United States

October Term 1990

ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Are the standards used by the Florida Supreme Court to approve or disapprove a death sentence imposed by a trial judge despite a jury's recommendation of life subject to Eighth Amendment review; and was the affirmance of Petitioner Parker's death sentence based upon an unconstitutional application of those standards?

II. Did the Court of Appeals below err in holding that Petitioner's constitutional claim against an evidentially unsupportable felony murder conviction was not presented to and decided by the Florida Supreme Court on direct appeal and that, even if the claim was properly preserved on appeal, it was procedurally barred by Petitioner's failure to re-raise it in state postconviction proceedings?

III. Where the jury was permitted to convict Petitioner of first degree murder on either a felony murder theory or a premeditated murder theory, did the Court of Appeals err in holding that the availability of the latter theory made it harmless error to instruct the jury to completely disregard Petitioner's defense to felony murder?

IV. Was Petitioner denied Due Process when the prosecutor was permitted to cross examine him about the fact that he had conferred with defense counsel during a recess in his testimony, although the conference had been authorized by the trial judge and although the prosecutor offered no good faith basis for asserting that it involved any conduct legitimately relevant for impeachment?

(A Fifth question presented in the petition for certiorari is now moot and will not be briefed.)

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CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Florida Supreme Court affirmed Robert Parker's convictions and sentences on direct appeal. *Parker v. State.* 458 So.2d 750 (Fla.1984). This Court denied certiorari. *Parker v. Florida,* 470 U.S. 1088 (1985). The Florida Supreme Court affirmed the denial of Parker's State post conviction action brought pursuant to Rule 3.850, Florida Rules of Criminal Procedure. *Parker v. State,* 491 So.2d 532 (Fla.1986). The United States District Court for the Middle District of Florida denied Parker's petition of writ of habeas corpus as to his convictions, but granted relief from the death sentence in an unreported order (J.A.91-146). The Eleventh Circuit Court of Appeals affirmed the denial of relief from convictions, but reversed the District Court's order vacating the death sentence. *Parker v. Dugger,* 876 F.2d 1470 (11th Cir.1989).

Citations to the Joint Appendix are designated J.A. ___. Citations to the transcript in the State trial court are designated as T.___. Citations to the State appellate Record on Appeal, which consists of the pleadings filed in the State trial court, are designated R.___. All parties will be referred to as they appeared in the trial court. Emphasis is supplied unless otherwise noted.

STATEMENT OF THE GROUND ON WHICH JURISDICTION IS INVOKED

The judgment and opinion of the Court of Appeals was filed on June 19, 1989, and Mr. Parker's timely Petition for Rehearing and Suggestion of Rehearing En Banc was denied on August 17, 1989. Mr. Parker's Petition for Writ of Certiorari was filed with this Court on November 7, 1989. On June 28, 1990, this Court entered an Order

granting certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defence,

The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,

And the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law
> . . . .

This case also involves the application of Section 921.141, Florida Statutes (1981), attached after conclusion of brief.

STATEMENT OF THE CASE

A. Undisputed Facts.

On the morning of Friday, February 5, 1982, Robert Parker provided a gram of phencyclidine, a controlled substance referred to as "T," to Tommy Groover (T.1817). Groover was to sell the T at a profit and then pay the Defendant after the sale, keeping the profit for himself (T.1813-4). Groover, Richard Padgett and another acquaintance then used the T (T.1128-9, 1140). This made Parker upset with Groover, because he was concerned

that Groover would not be able to pay him back for the T (T.1817). Padgett told Groover that he would give him some T of his own later that evening (T.1141). The next day, the Defendant went to the residence of Billy Long, where Groover was living (T.1182, 1334-5). Groover and Long were going out to try to collect money that was owed to them for drugs that Groover and Long had sold (T.1361). Groover was armed with a shotgun (T.1212). Long and Groover went looking for Padgett (T.1361-78, 1686-7). Groover and Long met up with Padgett and his girlfriend, Nancy Sheppard, at a bar that evening (T.1245-6). They all proceeded to the mobile home where Robert and Elaine Parker (Robert's ex-wife) were living, picked up the Parkers, and returned to the Sugar Shack (T.1387-92). Long took Nancy Sheppard home and dropped her off (T.1249-52).

Later that night, a witness observed Groover beating up Padgett at a junkyard owned by Parker's parents (T.1457-8, 1468-9). The Defendant went to the witness' door and asked for a wash cloth to care for Padgett, who was bleeding (T.1469-70). Groover was heard to be arguing with Padgett, and was seen with a gun in his hand as he left the witness' premises (T.1470-3). Parker was unarmed (T.1471-2). Padgett was killed soon thereafter. Shortly after midnight, another witness observed Groover and Parker melting down a gun at the junkyard (T.1482-4). This witness noticed that Groover had something stuck in his pants off to one side, covered by his shirt (T.1497-8).

Groover asked Elaine and Robert Parker to take him to another bar, where Groover met a girlfriend, Jody Dalton (T.1851-2, 1341-2). Dalton accompanied Groover and the Parkers to the Parkers' trailer; Dalton was dropped off and Groover and the Parkers proceeded to

pick up another friend, Joan Bennett (T.1853-6). They all returned to the Parkers' trailer, and then went to an area called Donut Lake (T.1512-3). Once at the lake, Groover kicked and beat Dalton, then pulled a gun from his boot and shot her (T.1518-19). The Defendant shouted "What are you doing you crazy m——f——?" (T.1559). Dalton's body was then tied to concrete blocks and sunk in the lake (T.956-985). As they left the lake, Groover told Bennett that he would kill her if she said anything, and that he would have somebody kill her even if he was in jail (T.1563-4). Bennett was dropped off at her trailer (T.1564-5).

Groover and the Parkers then went to Billy Long's house and picked up Long (T.1252-5). While Groover drove Elaine's car, Long told Groover how to get to Sheppard's house (T.1253, 1402). Elaine went to Sheppard's door and got Sheppard to accompany them in the car (T.1869). Sheppard was taken to a wooded area, where she saw Padgett's body in a ditch (T.1260). Long then shot her (T.1410). Long threw her body into the ditch next to Padgett (T.1427-9).

The next day, Monday, a conversation between Groover and the Defendant was overheard by a State witness. Groover stated that he (Groover) had cut Padgett's throat after Padgett was shot (T.1494). Groover was heard to say that he (Groover) had "made Billy Long shoot the girl." (T.1494) Robert Parker was heard telling Groover that he (Parker) did not know Padgett was going to be killed, and that he thought that Padgett was going to be left in the woods to walk home (T.1494).

Medical evidence showed that Padgett had been killed by a gun shot wound to the back of the head, and that he had also received two potentially fatal stab wounds to the chest and non-fatal slash wounds across

his neck (T.1019-21). Dalton died of four gun shot wounds to the head (T.1058-66). Sheppard died from five gunshot wounds, two to the back of the head, one over the eye, and two in the chest (T.1025-31). Sheppard also received seven non-fatal, superficial stab wounds to the neck (T.1029, 1032, 1049).

B. State's Theory.

The State's case was based primarily upon the testimony of Billy Long and Joan Bennett. Long testified that Parker had threatened Padgett with a gun at Parker's mobile home (T.1391). Long said that Groover and Parker tricked him into going with them to Sheppard's house on the morning of her death by telling him that Padgett wanted to see Sheppard (T.1252-3, 1397-8). Long further claimed that the Defendant showed him the body of Padgett in the ditch and then ordered Long to kill Sheppard, or to "lay in the ditch with them." (T.1257-1404). Long said that Elaine then handed him a pistol and that he proceeded to shoot Sheppard (T.1260-1, 1410). Long said that the Defendant obtained a knife from Groover and cut Sheppard's throat (T.1261, 1410-1). Long stated that the Defendant took Sheppard's necklace and class ring before Long threw her body into the ditch (T.1261, 1427-9). Long said that he was afraid of Robert Parker because the Defendant had shot him during an argument two years earlier (T.1257-9, 1336-8).

Joan Bennett testified that, on the way to Donut Lake, Groover told Parker that he was going to "waste" Jody Dalton because "she had seen the piece that we used on Richard." (T.1514). Bennett alleged that the Defendant agreed with Groover (T.1551). Though Bennett confirmed that the Defendant shouted, "What are you doing?" at Groover at the time Groover shot Dalton, she added that

the Defendant was only concerned about the noise (T.1519, 1559).

In summation, the State argued that Padgett was not killed for money, but that he was killed because the Defendant and Groover were afraid of Padgett's family, and had to silence Padgett (T.2130-1). The State argued that the Dalton and Sheppard murders were perpetrated to cover up the Padgett murder (T.2261).

C. Defense Version.

Robert Parker testified that, though Groover did owe him money for the gram of T, Groover had given him a gold cross and necklace as collateral until he could pay him back, so the Defendant was not concerned about getting his money (T.1826). The Defendant denied threatening Padgett or being angry with Padgett at all, because Groover, not Padgett, owed him money (T.1832-3). Because Groover and Padgett were arguing and beginning to fight in the car, the Parkers took them to Parker's parents' junkyard to let them fight (T.1838-40). Parker broke up the fight when Groover hit Padgett with brass knuckles (T.1840-1). The Defendant obtained assistance for Padgett, who was bleeding from the fight (T.1841-2). The Defendant testified that Groover told them that they should take Padgett out into the woods, drop him off, and let him walk home, because they would risk attack from Padgett's brothers and cousins if they took Padgett home in a beaten condition (T.1843-4). Elaine followed Groover's instructions and drove them into an isolated, wooded area (T.1844). Robert and Elaine remained in the car and Groover and Padgett got out (T.1844). They heard a gun shot, and Robert jumped out of the car (T.1845). Parker then saw Padgett laying on the ground, and Groover attempting to shoot Padgett again, then stabbing

him with his knife (T.1845-6). After killing Padgett, Groover told the Parkers to keep quiet about the murder or he would "get them" or "get their children" (T.1847-9). Parker melted down the murder weapon at his parents' junkyard, after observing that Groover had another pistol in his pants (T.1849-50).

The Defendant testified that he was unaware of any intention on Groover's part to kill Jody Dalton until, while at Donut Lake, Groover knocked her down, kicked her, pulled the pistol out of his boot and shot her (T.1860-1). Parker agreed that he shouted at Groover, but denied that he was concerned about the noise (T.1861-2). Parker said he was afraid of Groover, after having seen him kill two people, and that when Groover told him to tie concrete blocks to the body and take it into the lake, he did so (T.1863-4).

The Defendant testified that he and Elaine were hoping that Groover would leave them when he found Billy Long, but instead, Long joined them in the car (T.1866-7). The Defendant believed that Long was aware of Groover's plan when he got into the car (T.1868). Elaine went and got Nancy Sheppard to come out to the car upon Groover's orders (T.1869). Once at the wooded area where Padgett had been killed, the Defendant testified that he got out of the car only to let others get out behind him (T.1870). When Sheppard walked over to the ditch, she fell to her knees and Long walked over and shot her (T.1870). Parker remained standing at the car (T.1870). Parker heard Groover tell Long to cut Sheppard's throat, then turned and got back in the car because he did not want to watch (T.1871).

The credibility of Bennett and Long was vigorously attacked. It was shown that Bennett was allowed to plead guilty to accessory after the fact to first degree murder in

exchange for her testimony for the State. Upon her agreement to testify for the State, she had been released from jail (T.1582-3). Long, who had been facing a charge of first degree murder and unrelated charges of sale and possession of methaqualone and sale and possession of cocaine, was permitted to plead guilty to second degree murder, and the remaining charges were dismissed (T.1436-40). Though Long said that he killed Sheppard because he was afraid of Parker, he admitted that he did not see Parker with a gun at all that morning, and that the Defendant at no point said that he was armed (T.1418-20). Long was 6'2" tall, weighed 240 pounds, and had been employed as a bouncer at a local topless bar (T.1334, 1338). The Defendant was 5'10" and weighed approximately 190 pounds (R.1). Long had sworn to police that Parker had forced him to shoot Sheppard by pointing a gun at him, but at trial, Long admitted that this was not true (T.95-7, 1414-7, 1417-21, 1424, 1432).

The defense also presented the testimony of several other jail inmates concerning statements made by Billy Long. One inmate heard Long talking to Groover and advising him "if you don't want to get the electric chair, you better do like I did and say Robert made you do it" (T.1749). Another jail inmate overheard Long boasting that he would lie to see to it that Robert Parker got the death penalty (T.1765). Long confided to this inmate that he, not Parker, had cut Sheppard's throat (T.1765). Long told this inmate that the Defendant was at the car at the time Sheppard was killed, and that only Long and Groover were outside the car with Sheppard (T.1766). Parker's version of the Sheppard homicide was further corroborated by statements Groover had made to this same inmate, that Parker was back at the car when Sheppard was murdered, and had had no active involvement

in her death (T.1788). A third jail inmate also testified that Long had told him that Long, not the Defendant, had cut Sheppard's throat (T.1799-1800).

D. Trial Court's Submission of Guilt Issue to Jury.

The Indictment charged the Defendant with first degree murder in the death of Richard Padgett in Count One, first degree murder in the death of Nancy Sheppard in Count Two, and first degree murder in the death of Jody Dalton in Count Three (R.133-4). At the charge conference, the State requested that the jury be instructed on first degree felony murder as to both Count One and Count Two, arguing that the applicable felony in Count One was kidnapping and, in Count Two, robbery (J.A.3-5). The Defendant objected to the felony murder instruction on the ground that it was not supported by the evidence, but his objection was overruled (J.A.3-5).

The defense submitted an instruction concerning the common law defense of duress or coercion, as follows:

> One of the defenses asserted in this case is that the defendant participated in the alleged offense under duress; that is, that he was forced to participate in the offense alleged. In order to constitute a defense, the coercion or duress must be present, imminent, and impending, and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done. (Citation omitted.) It is assumed that every person's actions are free from duress, absent evidence to the contrary. However, once some evidence of duress has been brought before the jury, the burden is upon the state to prove beyond a reasonable doubt that the defendant did not act under duress. (Citations omitted.) (R.360).

The State submitted this contrasting requested instruction:

> Coercion or duress is not available as a defense in a case of homicide or attempted homicide. Coercion or duress does not excuse or justify the murder or an attempted murder of an innocent third party. (Citation omitted.) (R.320).

The Defendant's requested instruction was denied (J.A.12-5). The defense objected to the State's requested instruction, and requested a modification of the instruction to the effect that duress could be a defense to felony murder where the accused was not the actual killer (J.A.16-9). The trial court ruled that the State's "duress is not a defense to homicide" instruction would be given without limiting its applicability to premeditated murder (J.A.22-5). The jury returned general verdicts finding the Defendant guilty of first degree murder in Count One, first degree murder in Count Two, and third degree murder in Count Three (J.A.30-2).

E. Penalty Phase.

The evidence presented by the State in aggravation consisted of a judgment showing the Defendant had been convicted of aggravated battery in the shooting of Billy Long in 1980 (T.2314-7). The defense presented testimony from a number of the Defendant's relatives and friends (T.2318-2365). This evidence showed the Defendant being raised by an alcoholic, wife beating father, and being influenced by Elaine, an older woman, to leave school after the ninth grade and to use illegal drugs. Despite these problems, the evidence showed the Defendant to be a good father to his two young children, ages nine and eleven, and that he had unselfishly assisted relatives and neighbors in times of personal crisis and need.

The defense also presented the written negotiated plea agreement of Elaine Parker, in which the State had dropped two first degree murder charges and reduced the murder of Nancy Sheppard from first degree to second degree, in exchange for a guilty plea and her promise to testify for the State (T.2366). Despite this agreement, the State did not call Elaine Parker as a witness, because she could not rebut the Defendant's testimony (T.2053-4, 2056-8).

The defense also introduced documents showing that Tommy Groover had been convicted of three counts of first degree murder, and that the trial court had sentenced Groover to death for the murders of Padgett and Dalton, and to life imprisonment for the Sheppard murder (T.2377-8).

The State presented no rebuttal evidence.

The jury was given a specific verdict form, and found that sufficient mitigating circumstances existed that outweighed any aggravating circumstances and therefore recommended a sentence of life imprisonment as to both the Padgett and Sheppard murders (J.A.33-5).

At the final sentencing hearing before the court, the State, over objection, presented the testimony of relatives of Richard Padgett and Nancy Sheppard, in which they described the decedents in sympathetic terms and asked the court to impose the death penalty (T.2533-51). The defense presented no additional evidence and, after hearing argument, the court imposed a life sentence for the Padgett homicide, a death sentence for the Sheppard homicide, and a term of fifteen years imprisonment for the Dalton homicide (J.A.36-63). The sentencing order is replete with factual errors, including a description of the Padgett homicide that is without any evidentiary basis

whatsoever, and a description of the Dalton homicide that requires the acceptance of Joan Bennett's testimony, despite its clear rejection by the jury. The court found six aggravating circumstances and no mitigating circumstances for either the Sheppard or Padgett homicides, then imposed the death sentence for the Sheppard murder. Nowhere in the sentencing order did the trial judge address non-statutory mitigating circumstances (J.A.36-63).

SUMMARY OF ARGUMENT

Argument I

Both the U. S. District Court and the Eleventh Circuit Court of Appeals found that the application of the *Tedder* jury override standard is subject to some form of review under the Eighth Amendment. In *Lewis v. Jeffers*, 110 S.Ct.3092 (1990), this Court described a three step analysis to determine the constitutionality of state law rules which are used to support a death sentence. Applying this three step analysis to the *Tedder* standard, it appears that the *Tedder* standard is unconstitutional on its face, but constitutional as construed by the Florida Supreme Court. However, because the Florida Supreme Court did not apply the constitutional construction of *Tedder* in this case, the death sentence must be vacated and remanded to the Florida Supreme Court for reconsideration.

Argument II

At trial, the Defendant objected to a jury instruction on felony (robbery) murder on grounds that the evidence was insufficient to sustain the instruction, but the instruction was given and the jury returned a general verdict of

guilty. On appeal, the Florida Supreme Court found that the evidence was insufficient to prove the existence of the felony of robbery as an aggravating circumstance. On rehearing, the Petitioner pointed out that he could well have been convicted on a felony murder theory that was not supported by the evidence. The State objected to rehearing on grounds that the defense was re-arguing issues that had already been decided. Rehearing was denied without opinion. It is Petitioner's contention that his conviction in Count Two must be set aside because it could rest on the invalid felony murder theory. The Eleventh Circuit found procedural default because the Petitioner had not raised the issue on direct appeal, but also found that, even if Petitioner did raise it, the claim was defaulted because it was not raised in state court collateral proceedings as well. Petitioner submits that he raised the sufficiency of the evidence issue in both the trial and appellate court levels in state court, and thus it was unnecessary to raise it a second time in state collateral proceedings. On the merits, Petitioner should receive a new trial under *Stromberg v. California*, 283 U.S. 359 (1931).

Argument III

The Petitioner asserted a duress defense as to Count Two. His request for a general duress instruction was denied. The State requested an instruction that duress was not a defense to murder, which was granted. The Petitioner requested a modification of the State's instruction, allowing duress to be considered as a defense to felony murder, but this was denied. The Eleventh Circuit found that the Petitioner's requested instruction was misleading because it implied that duress could be a defense

to premeditated murder as well as felony murder, and therefore held that the denial of the instruction did not violate due process. The court completely overlooked the fact that the State's requested instruction was equally misleading, yet was in fact given to the jury. The giving of this instruction permitted the State to argue that the Petitioner should be convicted even if his own testimony was believed. It had the effect of a directed verdict of guilty, and cannot be squared with Fourteenth Amendment due process.

Argument IV

While the Petitioner was on cross examination, the court declared a recess and permitted him to consult with his attorney, consistent with this Court's holdings in *Geders v. U.S.*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 109 S.Ct. 594 (1989). When the trial resumed, without any sort of proffer, the prosecutor accused the Petitioner of being "well coached," then brought out the fact of consultation during the recess as if to confirm that in fact the Petitioner had been engaging in improper coaching with his attorney. No questions were asked concerning the actual nature of the communications. It is constitutionally impermissible for a state to tell an accused that he has the right to act in a certain fashion, then to attack him because he exercised that right. The truth-seeking function of impeachment is not served by allowing cross examination on constitutionally protected attorney-client communications in the absence of any grounds for a good faith belief that coaching has occurred. The action of the prosecutor here violated the Petitioner's rights under the Sixth and Fourteenth Amendments.

ARGUMENT I

THE STANDARDS USED BY THE FLORIDA SUPREME COURT TO APPROVE OR DISAPPROVE A DEATH SENTENCE IMPOSED BY A TRIAL JUDGE DESPITE A JURY'S RECOMMENDATION OF LIFE ARE SUBJECT TO EIGHTH AMENDMENT REVIEW; AND THE AFFIRMANCE OF PETITIONER'S DEATH SENTENCE WAS BASED UPON AN UNCONSTITUTIONAL APPLICATION OF THOSE STANDARDS.

In *Proffitt v. Florida*, 428 U.S. 242 (1976), this Court upheld the facial constitutionality of Florida's death penalty sentencing procedure. In finding that Florida Statute 921.141 was constitutional, the court noted that:

> The Florida capital sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and re-weighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." *Songer v. State*, 322 So.2d 481, 484 (1975). See also, *Sullivan v. State*, 303 So.2d 632, 637 (1974). *Proffitt v. Florida, id.*, at 254.

This Court also noted the additional function of the Florida Supreme Court to review the decisions of trial judges " . . . to ensure that they are consistent with other sentences imposed in similar circumstances." *Id.* In upholding Florida's capital sentencing scheme, therefore, this Court understood that the Florida Supreme Court reweighed the aggravating and mitigating circumstances in reviewing a death sentence, and also conducted a proportionality review to eliminate the previous constitutional

infirmity that there was "no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 188, (1976), quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring), *Proffitt, id.*

In *Dobbert v. Florida*, 432 U.S. 282 (1977), this Court had occasion to consider another death sentence imposed by Judge Olliff despite a life recommendation from the jury. This Court recognized the safeguard provided by the Florida Supreme Court's standard used to review a trial court's jury override:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975).

This Court described the *Tedder* standard as a "crucial protection" requiring "exacting standards." *Dobbert v. Florida, id.*, at 296-7.

This Court considered another of Judge Olliff's jury override sentences in *Barclay v. Florida*, 463 U.S. 939 (1983). In *Barclay*, Judge Olliff had found an improper aggravating circumstance in sentencing Barclay to death. This Court noted the evolving body of Florida case law:

> One question that had arisen is whether defendant must be re-sentenced when trial courts erroneously consider improper aggravating factors. If the trial court found that some mitigating circumstances exist, the case will generally be remanded for re-sentencing. *Elledge v. State*, 346 So.2d 998, 1002-1003 (Fla.1977). See, e.g., *Moody v. State*, 418 So.2d 989, 995 (Fla.1982); *Riley v. State*, 366 So.2d 19, 22 (Fla.1979). If the trial court properly found that there are no mitigating circumstances, the Florida Supreme Court applies a harmless error analysis. *Elledge, supra*, at 1002-1003. See, e.g., *White v. State*, 403 So.2d 331 (Fla.1981); *Sireci v. State*, 399 So.2d 964, 971 (Fla.1981). *Barclay v. Florida, id.*, at 954-5.

The Court then recognized the *Tedder* standard as "another check on the harmless error analysis permitted by *Elledge.*" *Id.*, at 955-6. The Court noted that the "touchstone" in determining whether the consideration of improper aggravating factors was reversible error was the presence or absence of mitigating circumstances. *Barclay, id.*, at 966, n.12. If there are improperly considered aggravating circumstances, and any mitigating circumstances, the error is not harmless. Significantly this Court noted that "nonstatutory mitigating circumstances did not play any role" in the *Elledge* harmless error analysis. *Barclay v. Florida, id.*, at 967, n.13. *Barclay*, of course, was decided well before this Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), where this Court held that the Eighth Amendment requires both Florida judges and juries to consider evidence of non-statutory mitigating circumstances.

Finally, this Court most recently considered a Florida jury override in *Spaziano v. Florida*, 468 U.S.447 (1984). The Court ruled that Florida's sentencing scheme, permitting a judge to overrule a jury life recommendation, does not violate the Eighth Amendment, in part because of the "significant safeguard" accorded capital defendants by the *Tedder* standard, and in part because meaningful appellate review by the Florida Supreme Court had reduced the likelihood that the death penalty would be imposed in an arbitrary or discriminatory manner. *Id.*, at 465-6. This Court found no indication that the application of the jury override procedure had resulted in the unconstitutional application of the death penalty, in general, or in the case before it. *Id.*, at 466.

The capital sentencing process in Florida, as approved by this Court, thus involves three players: the jury, the judge, and the Florida Supreme Court. *Alvord v. State*, 322 So.2d 533, 542 n.10 (Fla.1975) (England, J., concurring and dissenting). The Florida Supreme Court has made frequent reference to "our trifurcated death penalty statute." See, *Ross v. State*, 384 So.2d 1269, 1275 (Fla.1980); *Dobbert v. State*, 375 So.2d 1069, 1071 (Fla.1979); *Schue v. State*, 366 So.2d 387, 390 (Fla.1978); *Buckrem v. State*, 355 So.2d 111, 113 (Fla.1978); *Burch v. State*, 343 So.2d 831, 834 (Fla.1977); *Provence v. State*, 337 So.2d 783, 787 (Fla.1976); *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). This Court has referred to the Florida Supreme Court as occupying the final tier of the capital sentencing process "in what may be termed a tripartite review." *Dobbert v. Florida. id.*, at 296. Thus, the *Tedder* standard is used by the Florida Supreme Court to make the determination as to whether life or death is the appropriate sentence.

The Florida Supreme Court has noted that a jury life recommendation eliminates any presumption that death is the appropriate penalty, even though one or more aggravating circumstances may be present. *Williams v. State*, 386 So.2d 538 (Fla.1980). The obligation of the Florida Supreme Court in applying Tedder is to scrutinize the trial record for any mitigating circumstances that could form a "reasonable basis" for the jury's recommendation, as described in *Malloy v. State*, 382 So.2d 1190 (Fla.1979):

> Therefore, we must examine this record to determine whether there are clear and convincing facts that warranted the imposition of the death penalty, and, in doing so, we must determine if there was a reasonable basis for the jury's recommendation. *Id.*, at 1193.

By the time of Robert Parker's appeal, the Florida Supreme Court had said that "it is well settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." (Citations omitted.) *Richardson v. State*, 437 So.2d 1091, 1095 (Fla.1983). This "reasonable basis" test requires the Florida Supreme Court to examine the record for mitigating circumstances that could have influenced the jury to return a life recommendation even where the trial court judge found that no mitigating circumstances existed in his sentencing order. *Malloy, id.; Richardson, id.; Hawkins v. State*, 436 So.2d 44 (Fla.1983); *Welty v. State*, 402 So.2d 1159 (Fla.1981); *Neary v. State*, 384 So.2d 881 (Fla.1980). It is against this framework of Florida law, well established at the time of Mr. Parker's appeal, that the evidence and arguments made at Mr. Parker's trial must be viewed.

It is Mr. Parker's contention that at least one, if not two, rules of appellate review in Florida have been applied unconstitutionally in this case: the *Tedder* jury override rule, and the *Elledge* harmless error rule. This Court has repeatedly recognized the general principle that rules and standards governing the imposition of capital sentences must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not. *Lewis v. Jeffers*, 110 S.Ct. 3092, 3099 (1990). Because the *Tedder* rule is a standard by which the Florida Supreme Court decides whether a sentence of life or death is appropriate, the *Tedder* standard must be applied " . . . in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." See, *Lewis v. Jeffers, id.*, quoting

Spaziano v. Florida, 468 U.S. at 460 (1984). Likewise, the *Elledge* rule is a standard by which the Florida Supreme Court determines whether to affirm a death sentence or to remand for resentencing.

In *Lewis v. Jeffers*, this Court described three ways in which a standard governing the imposition of a capital sentence can be found to be constitutionally deficient:

> 1. Where the standard is vague on its face and has not been construed by the state courts in a manner sufficient "to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment." *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988).
> 2. Where the state courts have adopted a constitutional narrowing construction of the standard, but where the state courts fail to apply the narrowing construction to the facts of the individual case. *Godfrey v. Georgia*, 446 U.S. 420, 432 (1980).
> 3. Where a state has adopted a constitutionally narrow construction of a standard governing the imposition of a death sentence, and has applied that construction to the facts of the particular case, its application is unconstitutional only if no rational trier of fact could have found the standard applicable based upon the evidence in the record. *Lewis v. Jeffers*, *id.*, at 3102-4.

If the *Tedder* standard is analyzed in these terms, it would be unconstitutionally broad and vague on its face. The *Tedder* standard is simply that "the facts suggesting the sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder*. *id.*, at 910. The standard does nothing to inform sentencers what they must find to impose the death penalty and, as a result, "leaves them and the appellate courts with the kind of open ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972)." *Maynard*, *id.*, at 362. The *Tedder* standard, on its face and

without judicial construction, performs no channeling or limiting of the sentencer's discretion in imposing the death penalty, and therefore fails to minimize the risk of wholly arbitrary and capricious action. See, *Maynard*, *id.* Additionally, it makes no allowance for the consideration of mitigating circumstances, and so runs afoul of this Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

It appears, however, that this Court upheld the constitutionality of the *Tedder* standard by reference to its construction by the Florida Supreme Court. See, *Spaziano v. Florida*, 468 U.S. at 465, citing *Richardson v. State*, 437 So.2d 1091, 1095 (Fla.1983), with approval. As noted, the *Richardson* construction of the *Tedder* standard requires the appellate court to examine the record for mitigating circumstances to determine if there is any "reasonable basis" for the life recommendation. The reasonable basis construction of *Tedder* was established well before Mr. Parker's trial, see *Malloy v. State*, 382 So.2d 1190 (Fla.1979), and is now firmly entrenched in Florida law. See, *Spivey v. State*, 529 So.2d 1088, 1095 (Fla.1988); *Fead v. State*, 512 So.2d 176, 178 (Fla.1987); *Ferry v. State*, 507 So.2d 1373, 1376 (Fla.1987). This construction would appear to get the *Tedder* standard past the *Maynard v. Cartwright* test for facial invalidity. However, the application of the *Tedder* standard to Robert Parker's case does not meet the *Godfrey v. Georgia* test described above, because the state supreme court did not apply the *Richardson* construction to the facts of this case. The Florida Supreme Court's entire discussion concerning the jury override is as follows:

> The trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied. In

> light of these findings the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. *Tedder v. State*, 322 So.2d 908 (Fla.1975). The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty has been found appropriate. *Spaziano v. Florida*, 468 U.S. 447 (1984). *Parker v. State*, 458 So.2d 750, 754-5 (1984).

The plain language of the decision makes it clear that the Florida Supreme Court limited itself to an examination of the trial court's sentencing order in determining whether the jury override was proper. This, of course, is not consistent with the *Malloy/Richardson* construction of the *Tedder* standard, which requires the court to examine the record for mitigating circumstances that could have influenced the jury to return a life recommendation, even where the trial judge found no mitigating circumstances in his sentencing order. As in *Godfrey*, there is "no evidence" that the state court applied the narrowing construction of *Tedder* to the facts of this case. See, *Lewis v. Jeffers, id.*, at 3099. There is no evidence indicating that the Florida Supreme Court looked beyond the trial court's sentencing order to determine the "facts suggesting the sentence of death." The only mention of mitigating circumstances is the statement that the trial judge found none. There is no reference to any examination of the record to determine if there is any "reasonable basis" for the life recommendation.

At the advisory sentencing proceeding, Mr. Parker argued the existence of both statutory and non-statutory mitigating circumstances that were supported by the evidence at the guilt and penalty phases of the trial. Virtually all of these mitigating circumstances had been held to be a reasonable basis for a jury life recommendation by

the Florida Supreme Court in previous decisions. Such mitigating circumstances included:

1. *The statutory mitigating circumstance that the defendant acted under extreme duress or under the substantial domination of another person, as described in Section 921.141(6)(e), Florida Statutes.* The basis for this mitigating circumstance was the Defendant's testimony of the threats by Tommy Groover (T.1847-8, 1851, 1852, 1863, 1865, 1880-1) and the testimony by two state witnesses that the Defendant had been acting frightened (T.1697, 1562-3). The circumstance was argued to the jury (T.2483-4). The Florida Supreme Court had previously held that a jury override should not be sustained where there was evidence supporting a finding of this mitigating circumstance, because this mitigating circumstance forms a reasonable basis for the jury's life recommendation. See, *Goodwin v. State*, 405 So.2d 170 (Fla.1981); *Hawkins v. State*, 436 So.2d 44 (Fla.1983).

2. *The statutory mitigating circumstances that the Defendant was under the influence of extreme mental or emotional disturbance, or that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired, as described in Sections 921.141(6)(b), and (f). Florida Statutes.* The basis for these mitigating circumstances was the Defendant's intoxication on drugs and alcohol (T.2481-3). Evidentiary support for these mitigating circumstances was found in the testimony of the Defendant himself (T.1834, 1837, 1880-1), the testimony of five state witnesses, including Joan Bennett and Billy Long (T.1619, 1497, 1632, 1540-1, 1401-2), and two additional defense witnesses (T.1738-9, 1766). Such intoxication had previously been held to be a statutory mitigating circumstance, *Kampff v. State*, 371

So.2d 1007 (Fla.1979), and a non-statutory mitigating circumstance, *Buckrem v. State*, 355 So.2d 111 (Fla. 1978). The Florida Supreme Court had previously held that drug and alcohol intoxication constituted a reasonable basis for a jury life recommendation requiring death sentences be set aside in *Buckrem, id.*, *Cannady v. State*, 427 So.2d 723 (Fla.1983), and *Norris v. State*, 429 So.2d 688 (Fla.1983). The Florida Supreme Court has likewise recognized drug or alcohol intoxication as a reasonable basis for a jury life recommendation after its decision in Mr. Parker's case. See, *Amazon v. State*, 487 So.2d 8 (Fla.1986); *Fead v. State*, 512 So.2d 176 (Fla.1987); *Masterson v. State*, 516 So.2d 256 (Fla.1987); *Holsworth v. State*, 522 So.2d 348 (Fla.1988); *Pentecost v. State*, 545 So.2d 861 (Fla.1989).

3. *The statutory mitigating circumstance that the Defendant was an accomplice in the capital felony and his participation was relatively minor, as described in Section 921.141(6)(d), Florida Statutes.* This mitigating circumstance was argued to the jury (T.2484-7), on the grounds that Billy Long was lying to protect himself and Tommy Groover, his roommate and best friend; that it was Groover who advised Long to kill Nancy Sheppard; and that Long both shot her and cut her throat while Parker was at the car with his wife. The argument was supported by the testimony of the Defendant himself (T.1870-1), three defense witnesses (T.1749, 1765-6, 1788, 1799-1800), and at least one State witness (T.1494). In cases where a defendant was not the actual perpetrator of the homicide and where there was dispute as to the extent of his participation in the offense, the Florida Supreme Court had previously found a mitigating circumstance that would require a jury's life recommendation to be followed. See, *Taylor v. State*, 294 So.2d 648 (Fla.1974); *Slater v. State*, 316 So.2d 539 (Fla.1975); *McCaskill v. State*, 344

So.2d 1276 (Fla.1977); *Malloy v. State*, 382 So.2d 1190 (Fla.1979); *Goodwin v. State*, 405 So.2d 170 (Fla.1981); *Hawkins v. State*, 436 So.2d 44 (Fla.1983).

4. *The non-statutory mitigating circumstance that the jury could have believed Parker's testimony as to his lesser culpability and still found him guilty.* The evidence was uncontradicted that Parker was not the actual perpetrator of any of the three homicides. The State went so far as to argue that the Defendant should be convicted even if the jury believed his testimony (T.2147-9, 2264). The contention that Parker's testimony should be accepted over that of Long was argued to the jury a second time in the advisory sentencing trial as mitigation (T.2468-74). Previously, the Florida Supreme Court, in reversing two override death sentences for two execution style murders, stated:

> We find that the jury's action was reasonable because of the conflict in the testimony as to who was actually the triggerman and because of the plea bargains between the accomplices and the state. From the evidence presented, the jury could have believed the appellant's story that he was not the triggerman and still have convicted him of first degree murder. *Malloy, id.*, at 1193.

Similar reasoning resulted in the reversal of jury override death sentences in *Gilvin v. State*, 418 So.2d 996 (Fla.1982), before the decision in this case, and in *Holsworth v. State*, 522 So.2d 348 (Fla.1988), afterwards. [This factor can be a non-statutory mitigating circumstance even when the defendant's conduct is not so minor as to qualify under Section 921.141(6)(d), Florida Statutes. See *Spivey v. State*, 529 So.2d 1088 (Fla.1988).]

5. *Non-statutory mitigating circumstances concerning Mr. Parker's character and background.* The Eleventh Circuit described the evidence presented in support of non-statutory mitigating circumstances relating to the Defendant's

character and background as "copious." *Parker v. Dugger*, 876 F.2d at 1475, n.7. This evidence included the following: Robert Parker's father was an alcoholic who beat his mother in Robert's presence (T.2322-3). His father began giving Robert alcoholic beverages and taking him to bars at an early age (T.2323-4). Robert began dating Elaine, his co-defendant, when he was only 14 years old and Elaine was 16 years old (T.2325). When Elaine became pregnant, he married her at age 16 (T.2326-7). Elaine supported Robert and their baby with money from her job; he left school in the tenth grade to take care of his baby son and, later, his baby daughter (T.2327-30). Elaine introduced Robert to the use of illegal drugs (T.2357-8). The Defendant developed a drug and alcohol problem, and sought professional help, but Elaine was not supportive and he could not shake the problem (T.2330). Elaine was the dominant figure in the relationship (T.2333, 2361). The Defendant and Elaine had been married twice and divorced twice, and, at one point, he had become so distraught over Elaine leaving him that he had attempted suicide (T.2332). The Defendant had a son age 11 at the time of the trial, and a daughter age 9 at the time of the trial. He had always been a good father to his children, and had maintained a very close relationship with them (T.2338-9, 2342-4, 2346, 2351-2, 2361). The Defendant had often gone out of his way to help relatives and neighbors, including taking a neighbor's husband to a hospital three or four times a month for over a year for cancer therapy, as a favor and without reimbursement (T.2346-8), comforting a cousin through a crisis involving her baby (T.2352-4), and providing financial and emotional support for a sister when she was in marital distress (T.2359-60). This evidence was both presented and argued to the jury as mitigation (T.2388-91). The Florida Supreme Court had

previously held that such character evidence forms a reasonable basis for a life recommendation, prohibiting a jury override. See, *Neary v. State*, 384 So.2d 881 (Fla.1980); *Jacobs v. State*, 396 So.2d 713 (Fla.1981); *McCampbell v. State*, 421 So.2d 1072 (Fla.1982); *Washington v. State*, 432 So.2d 44 (Fla.1983).

6. *The non-statutory mitigating circumstance that equally culpable co-defendants had received more lenient treatment for their involvement in the Sheppard murder.* The defense introduced evidence of the disposition of the co-defendants' cases and argued it as mitigation in the advisory sentencing trial (T.2366, 2378, 2491-6). Tommy Groover, the perpetrator of the Padgett and Dalton murders, was sentenced to death for those crimes, but to life imprisonment for the murder of Nancy Sheppard. Elaine Parker, who owned both the car and murder weapon, drove the car throughout the evening, lured Nancy Sheppard out of her home, and (according to Billy Long) gave Long the murder weapon, was permitted to plead guilty to one count of second degree murder in the Sheppard homicide, and charges as to the other two murders were dropped against her. Long, who admitted murdering Nancy Sheppard by shooting her five times in the head and chest, was permitted to plead guilty to one count of second degree murder, and drug charges in two other felony cases were dropped against him. The Florida Supreme Court noted how it had applied this mitigating circumstance in numerous other cases prior to its decision in Robert Parker's case:

> This Court has upheld the reasonableness of jury recommendations of life which could have been based, to some degree, on the treatment accorded one equally culpable of the murder. *McCampbell v. State*, 421 So.2d 1072 (Fla.1982). In

such cases we have reversed the judge's decision to override the recommendation when the accomplice was a principal in the first degree; *Herzog v. State*, 439 So.2d 1372 (Fla.1983); *McCampbell v. State*; when the accomplice was the actual triggerman; *Barfield v. State*, 402 So.2d 377 (Fla.1981); *Slater v. State*, 316 So.2d 539 (Fla.1975); when the evidence was equivocal as to whether defendant or the accomplice committed the actual murder; *Smith v. State*, 403 So.2d 933 (Fla.1981); *Malloy v. State*, 382 So.2d 1190 (Fla.1979); *Halliwell v. State*, 323 So.2d 557 (Fla.1975); or when the accomplice was the controlling force instigating the murder; *Stokes v. State*, 403 So.2d 377 (Fla.1981); *Neary v. State*, 384 So.2d 881 (Fla.1980). *Futzy v. State*, 458 So.2d 755, 759 (Fla.1984).

The Florida Supreme Court has found this mitigating circumstance as a basis for disallowing jury override death sentences in numerous cases after Robert Parker's appeal as well. See, *Brookings v. State*, 495 So.2d 135 (Fla.1986); *DuBoise v. State*, 520 So.2d 260 (Fla.1988); *Caillier v. State*, 523 So.2d 158 (Fla.1988); *Harmon v. State*, 527 So.2d 182 (Fla.1988); *Spivey v. State*, 529 So.2d 1088 (Fla.1988); *Pentecost v. State*, 545 So.2d 861 (Fla.1989); *Fuente v. State*, 549 So.2d 652 (Fla.1989).

The fact that the trial court found four valid aggravating circumstances and no mitigating circumstances neither answers the question of whether there was a reasonable basis for the jury life recommendation nor supports the affirmance of a death sentence under Florida Supreme Court precedent. In other cases, a judge found four or more valid aggravating circumstances and no mitigating circumstances, but the Florida Supreme Court reversed for a life sentence because its examination of the record disclosed mitigating circumstances that could serve as a reasonable basis for the life recommendation.

Hawkins, id.; Richardson, id.; Neary, id.; Welty, id. In still other cases, the Florida Supreme Court reversed overrides because a review of the record indicated a reasonable basis for the life recommendation, even though the judge found valid aggravating circumstances and no mitigating circumstances. *Harvey v. State*, 439 So.2d 1372 (Fla.1983); *McCampbell, id.; Gilvin, id.; Barfield, id.; Williams, id.; Provence, id.; Taylor, id.*

If we were to speculate that the Florida Supreme Court did apply the narrowing *Malloy/Richardson* construction of the *Tedder* standard in Mr. Parker's case, the application of that standard to the facts of record cannot be justified, even under the *Lewis v. Jeffers* "rational fact finder" test. The question to be answered, under *Tedder*, is, "Could any rational factfinder find no reasonable basis for the jury's recommendation?" In addition to introducing evidence tending to show the presence of statutory mitigating circumstances, the Defendant presented and argued uncontradicted evidence of non-statutory mitigation. The Eleventh Circuit noted "the fact that the trial judge listened to copious evidence of non-statutory mitigating circumstances presented by Parker during the sentencing phase. . . . " *Parker v. Dugger*, 876 F.2d at 1475, n.7. The District Court noted that the presence of non-statutory mitigating circumstances was fairly supported by the record, and that these same mitigating circumstances had been held to form a reasonable basis for jury life recommendations in other cases. (J.A.141-2). Thus we have a situation where all the federal courts that have examined the record have unequivocally found evidence which would support a jury's life recommendation based on mitigating circumstances, but the Florida Supreme Court affirmed the death sentence on the stated ground that "[t]he trial court found no mitigating circumstances

to balance against the aggravating factors." 458 So.2d at 754. The fact that federal courts, in examining the record, found mitigating circumstances demonstrates compellingly that the Florida Supreme Court performed no examination of the record. If the Florida Supreme Court had examined the record, it would have found what the federal courts found and would have been compelled to vacate the death sentence, based upon its standard "narrowing" construction of *Tedder*:

> As we reiterated in the recent case of *Ferry v. State*, 507 So.2d 1373 (Fla.1987), only when there are no "valid mitigating factors discernible from the record upon which the jury could have based its recommendation" is an override warranted. *Id.* at 1376. *Fead v. State*, 512 So.2d 176, 178 (Fla.1987).

"When there is some reasonable basis for the jury's recommendation of life, clearly it takes more than a difference of opinion for the judge to override that recommendation." *Holsworth v. State*, 522 So.2d 348, 354 (Fla.1988). Because valid mitigating factors are so readily apparent, no rational fact finder could have applied the *Malloy/Richardson* construction of *Tedder* and sustained the death sentence here.

Subsequent decisions of the Florida Supreme Court give indications as to why Robert Parker's appeal was decided in such an aberrational manner. It appears that in 1984 and 1985, in the wake of *Spaziano*, the Florida Supreme Court affirmed a much higher percentage of overrides than it has before or since. The Florida Supreme Court recently commented on this phenomenon in *Cochran v. State*, 547 So.2d 928 (Fla.1989), at 933:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that *Tedder* has not been

> applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to *Grossman v. State*, 525 So.2d 833, 851 (Fla.1988) (Shaw, J., specially concurring):
>
> > During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, 73%. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than 20%. This current reversal rate of over 80% is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation. . . .
>
> Clearly since 1985 the Court has determined that *Tedder* means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." *Tedder*, 322 So.2d at 910.

Thus, the Florida Supreme Court itself has recognized that *Tedder* did not "mean what it says" in 1984, when Mr. Parker's appeal was decided.

One factor in the aberrant application of the *Tedder* standard is the Florida Supreme Court's misconstruction of *Lockett v. Ohio*, 438 U.S. 586 (1978), during the period when Mr. Parker's case was on appeal. After *Lockett* but before *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the Florida Supreme Court held that although nonstatutory mitigating evidence had to be admitted, it did not have to be considered by either the trial judge or jury. As the Florida Supreme Court noted in *Downs v. Dugger*, 514 So.2d 1069 (Fla.1987), at 1071:

> *Hitchcock* rejected a prior line of cases issued by this court, which had held that the mere opportunity to present non-statutory mitigating evidence was sufficient to meet *Lockett* requirements. Under this "mere presentation" standard, we routinely declined to consider whether the judge or jury actually weighed the evidence in question.

At the time of Robert Parker's appeal, then, the Florida Supreme Court not only applied the *Tedder* standard in an inconsistent fashion, it failed to consider whether the trial court judge gave any weight to non-statutory mitigating circumstances.

The Florida Supreme Court recently acted to correct this deficiency in *Campbell v. State*, ___ So.2d ___, 15 F.L.W. S.342 (Fla.1990). It is now required that a trial judge expressly evaluate by written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory mitigating circumstances, it is truly of a mitigating nature. *Id.*, at S.344. Valid nonstatutory mitigating circumstances include an abused or deprived childhood, contributions to society through an exemplary work, military, family or other record, charitable or humanitarian deeds, and disparate treatment of an equally culpable co-defendant. *Id.*, at n.6. These nonstatutory mitigating circumstances were all present in Robert Parker's case, yet none were mentioned by the trial judge or the Florida Supreme Court. Most recently, the Florida Supreme Court held that: " . . . when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find the mitigating circumstance has been proved." *Nibert v. State*, ___ So.2d ___, 15 F.L.W. S415, 416 (Fla.1990). In light of *Campbell* and *Nibert*, it appears that

the disregard of mitigating circumstances which characterized the sentencing opinions of the trial judge and the Florida Supreme Court in Mr. Parker's case cannot recur in the future.

An additional aspect of this case demonstrates that the Florida Supreme Court failed to look beyond the trial court's sentencing order and failed to consider non-statutory mitigating circumstances. The trial judge found six aggravating circumstances and no mitigating circumstances as to the Sheppard homicide (J.A.54-60). The Florida Supreme Court held that two of the aggravating circumstances were not supported by the evidence. *Parker*, 458 So.2d at 754. When a trial judge has improperly found one or more aggravating circumstances, the case will ordinarily be remanded for resentencing under the *Elledge* rule described above, unless the trial judge found no mitigating circumstances. *Elledge v. State*, 346 So.2d 998, 1002-3 (Fla.1977). For this purpose, the Florida Supreme Court prior to *Hitchcock v. Dugger*, considered only statutory, not non-statutory, mitigating circumstances. *Elledge, id.* See also, *Barclay v. Florida*, 463 U.S. at 966, n.12. The latter restriction helps to explain why Mr. Parker's evidence of non-statutory mitigating circumstances was ignored on appeal, but the explanation is constitutionally infirm. The trouble with it – and with the pre-*Hitchcock Elledge* rule – is that they run contrary to this Court's decisions in *Lockett*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Hitchcock*:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence . . . the sentencer and the court of criminal appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such

evidence from their consideration. *Eddings v. Oklahoma*, 455 U.S. at 113-5.

This in turn points up a related reason for reversal. In *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990), this Court held that, where a death sentence is based in part on an invalid or improper aggravating circumstance, a state appellate court may uphold the death sentence either by re-weighing the aggravating and mitigating evidence or by harmless error review. However, where the State's death penalty scheme requires the weighing of aggravation versus mitigation, the Eighth Amendment prohibits the automatic affirmance of a death sentence simply because there are one or more remaining valid aggravating circumstances. *Clemons, id.*, at 1450. Though Florida is a weighing state, and though the Florida Supreme Court on Mr. Parker's appeal held that two aggravating circumstances had been improperly found, that court made no mention of applying a harmless error analysis in upholding Parker's death sentence. Neither did the court state that it was re-weighing the aggravating and mitigating circumstances. A literal reading of its abbreviated opinion on this point suggests an automatic affirmance of the death sentence simply by virtue of the fact that valid aggravating circumstances existed. This, of course, is constitutionally impermissible under *Clemons*.

In summary, the Florida Supreme Court affirmed Robert Parker's death sentence, in disregard of the usual *Tedder* standard by failing to utilize the *Malloy/Richardson* "reasonable basis" test. This error may have been compounded by the application of the *Elledge* rule, which gives no consideration to non-statutory mitigating circumstances. The end result is that the Florida Supreme Court arbitrarily ignored the "copious evidence" of non-statutory mitigation that was undoubtedly the basis for

the jury's life recommendation. Mr. Parker's death sentence must be vacated unless and until the Florida Supreme Court reconsiders it, using constitutionally permissible standards of review. At the very least, *Clemons v. Mississippi* requires that the Florida Supreme Court conduct either a constitutionally permissible re-weighing of the evidence or a constitutionally permissible harmless error analysis.

ARGUMENT II

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S CONSTITUTIONAL CLAIM AGAINST AN EVIDENTIALLY UNSUPPORTABLE FELONY MURDER CONVICTION WAS NOT PRESENTED TO AND DECIDED BY THE FLORIDA SUPREME COURT ON DIRECT APPEAL AND THAT, EVEN IF THE CLAIM WAS PROPERLY PRESERVED ON APPEAL, IT WAS PROCEDURALLY BARRED BY PETITIONER'S FAILURE TO RE-RAISE IT IN STATE POST CONVICTION PROCEEDINGS.

During voir dire, the jury was extensively questioned about the law of felony murder (T.449-50, 582, 667-9, 779-80, 851-2). At the charge conference, the State requested that the jury be instructed on first degree felony murder as to both Count One and Count Two, arguing that the applicable felony in Count One was kidnapping and, in Count Two, robbery (J.A.3-5). The Defendant objected to the felony murder instruction on the grounds that it was not supported by the evidence, but his objection was overruled (J.A.4-5).

In summation, the prosecutors emphasized that Sheppard's ring and necklace had been removed from her body (T.2130); they noted that the jury would be instructed on both premeditated and felony murder (T.2143); they commented that Billy Long was not guilty

of felony murder (T.2147); they argued that Robert Parker was guilty of first degree murder even by his own testimony (T.2148-9, 2153); they discussed felony murder as it related to the Padgett homicide (T.2263-4); and, finally, they argued that Parker was guilty of first degree felony murder in the Sheppard homicide (T.2274-5). The jury returned a general verdict of guilty of first degree murder (J.A.31).

When the trial judge overruled the jury's life recommendation on to Count Two, he found the existence of an aggravating circumstance under Section 921.141(5)(d), Florida Statutes (1981): that the capital felony was committed during the course of a robbery (J.A.57). On direct appeal, the Florida Supreme Court rejected the finding that the murder was committed during a robbery because " . . . the evidence does not satisfy the standard of proof beyond a reasonable doubt." *Parker*, 458 So.2d at 754. However, it affirmed the conviction, saying that "[i]n addition to considering all other issues raised on appeal, *we have conducted an independent review of the record on trial and found no reason to award a new trial.*" *Id.* As the U.S. District Court later noted, the issue of the erroneous felony murder instruction was "clearly raised" at trial and "the Florida Supreme Court could not have overlooked" the issue (J.A.102-3). Upon receipt of the Florida Supreme Court's opinion, Parker filed a motion for rehearing, pointing out that the felony murder instruction could have caused the jury to convict him on a theory of guilt that was unsupported by the evidence (J.A.81-3). The Florida Supreme Court denied rehearing without opinion (J.A.87).

In *Stromberg v. California*, 283 U.S. 359 (1931), the defendant was convicted under a statute which contained

three clauses, one of which was constitutionally invalid. Even though his conviction could have rested solely on one of the valid clauses, this Court reversed the conviction because:

> The verdict against the appellant was a general one, it did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined on this record that the appellant was not convicted under that clause. *Id.*, at 367-8.

This Court has more recently restated the principle as follows:

> One rule derived from the *Stromberg* case requires that the general verdict be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. *Zant v. Stephens*, 462 U.S. 862, 882 (1983).

It is now settled, as well, that Fourteenth Amendment due process prohibits a conviction except upon proof beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). The Florida Supreme Court has ruled that the evidence as to felony murder in Count Two did not meet the reasonable doubt standard. *Parker*, 458 So.2d at 754. A conviction under this felony murder theory would therefore be unconstitutional under *Jackson*. Applying *Stromberg*, there are two independent grounds for the first degree murder verdict, and the felony murder ground is

constitutionally invalid. Because the verdict was a general one and it cannot be determined that the Defendant was not convicted under the constitutionally invalid felony murder theory, Robert Parker should be entitled to a new trial on Count Two.

The Court of Appeals declined to reach the merits of this issue, however, finding procedural default:

> The record reflects that Parker did not raise a *Stromberg* claim before the original trial court or on direct appeal to the Florida Supreme Court. He also did not raise the claim in his Rule 3.850 motion to the trial court or in his appeal to the Florida Supreme Court of the denial of that motion. *Parker v. Dugger*, 876 F.2d at 147.

The court found, alternatively, that, even if the *Stromberg* claim was raised in the Defendant's petition for rehearing on direct appeal, the issue was procedurally barred because it had not been raised again in his subsequent Rule 3.850 motion and collateral appeal. *Id.*, n.10. These holdings stem from an implausible view of the record and an apparent misconstruction of this Court's language referring to the "last state court rendering a judgment in this case" in *Harris v. Reed*, 109 S.Ct.1038 (1989).

Contrary to the panel opinion, the best and most reasonable interpretation is that the Florida Supreme Court did consider the merits of this issue, bringing the case within the rule of *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979). *First*, Parker objected to the felony murder instruction at trial on the grounds that the evidence was insufficient to support it. *Second*, the sufficiency of the evidence to support felony murder was presented to the Florida Supreme Court, albeit concerning an aggravating circumstance; and the Florida

Supreme Court found that the evidence was indeed insufficient. *Third*, the Florida Supreme Court conducted an independent review of the entire record to determine if there was any basis for a new trial, and found none. *Parker*, 458 So.2d at 754. *Fourth*, as the District Court noted, the issue was so readily apparent that the Florida Supreme Court "could not have overlooked it" during this review (J.A.103). *Fifth*, in capital cases, this kind of independent review by the Florida Supreme Court reaches issues not raised by the appellant. See, *e.g.*, *Elledge v. State*, 346 So.2d 998, 1002 (Fla.1977) ("admittedly the testimony . . . was not objected to by appellant's trial counsel, but that should not be conclusive of the special scope of review by his court in death cases"). *Sixth*, the fact that the Defendant may have been convicted on a theory of felony murder when the evidence of felony murder was insufficient was pointed out to the Florida Supreme Court in the Defendant's motion for rehearing. *Seventh*, the State's response to the motion for rehearing was not that the argument came too late, but that the motion was a re-argument of issues already decided (J.A.84-6). *Finally*, the rehearing motion was denied by the Florida Supreme Court without opinion. As in *Ulster County v. Allen*, there is simply nothing in this history to warrant an inference that the state court declined to decide the merits of Mr. Parker's claim. 442 U.S. at 150.

The Eleventh Circuit held, as an alternative ground, that even if the *Stromberg* issue was raised in Parker's motion for rehearing, it was procedurally barred because it was not raised in the "last state court rendering a judgment in the case." *Parker v. Dugger*, 876 F.2d at 1477, n.10. The "last state court rendering a judgment in the

case" was thought to be the Florida Supreme Court in its decision on the Defendant's appeal from state collateral proceedings. See, *Parker v. State*, 491 So.2d 532 (Fla.1986). Apparently, the panel interpreted this Court's language in *Harris* to require that a habeas corpus petitioner raise all constitutional issues in both direct appeal and state collateral proceedings in order to preserve the issues for federal review. Such an interpretation of *Harris* is an extreme departure from previous decisions of this Court which have specifically disapproved any requirement for "repetitious applications to state courts." *Roberts v. LaVallee*, 389 U.S. 40, 42-44 (1967). See also, *Hathorn v. Lovorn*, 457 U.S.255, 262 (1982), and *Reece v. Georgia*, 350 U.S. 85, 87 (1955). The sufficiency of the evidence to support felony murder was not raised in state collateral proceedings because it had been previously raised and decided on direct appeal. This Court should reach the merits of the issue and overturn Mr. Parker's conviction on Count Two.

ARGUMENT III

WHERE THE JURY WAS PERMITTED TO CONVICT PETITIONER OF FIRST DEGREE MURDER ON EITHER A FELONY MURDER THEORY OR A PREMEDITATED MURDER THEORY, THE COURT OF APPEALS ERRED IN HOLDING THAT THE AVAILABILITY OF THE LATTER THEORY MADE IT HARMLESS ERROR TO INSTRUCT THE JURY TO COMPLETELY DISREGARD PETITIONER'S DEFENSE TO FELONY MURDER.

At the charge conference at trial, the defense requested a general duress instruction (J.A.12-14). The State objected, and requested its own instruction which stated that duress is not a defense to homicide (J.A.16).

The defense objected to the State's requested instruction as being overbroad and proposed that the instruction be modified to indicate that duress can be a defense to felony murder (J.A.17-18). The trial court judge offered to give no instruction on the issue, but the State objected (J.A.19). The trial court judge then agreed to give the State's requested instruction without the defense's requested modification, and did so (J.A.22-5). As a result of the giving is this instruction, the State argued vigorously that the Defendant was guilty of first degree murder even if the jury believed his testimony, because duress was not a defense to murder (T.2147-9, 2153).

In addressing this issue, the Eleventh Circuit assumed that duress is a defense to felony murder under Florida law[1] and that a state trial judge violates the defendant's right to due process by incorrectly instructing the jury on his defense.[2] As this Court has said, "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The due process clause guarantees a defendant in a criminal case a meaningful opportunity to

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[1] While there is no clear holding to this effect, two Florida appellate courts have indicated that duress may be a defense to felony murder, see *Wright v. State*, 402 So.2d 493, 498-9, n.8 (Fla.3d DCA 1981); *Chestnut v. State*, 505 So.2d 1352, 1354 (Fla.1st DCA 1987), and the Florida Supreme Court assumed, without deciding, that duress is a defense to felony murder in *Goodwin v. State*, 405 So.2d 170, 172 (Fla.1981), and *Hawkins v. State*, 436 So.2d 44, 46 (Fla.1983).

[2] See, *U.S. ex rel Reed v. Lane*, 759 F.2d 618 (7th Cir.1985); *U.S. ex rel Means v. Solem*, 646 F.2d 322 (8th Cir.1980).

present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984).

The Eleventh Circuit ruled that the Defendant's requested instruction on duress was misleading because it implied that duress could be a defense to either felony murder *or* intentional murder. *Parker v. Dugger*, at 1479. Because the defense instruction was overbroad, the court found that there was no violation of due process in the trial court's refusal to give it. *Id.* The court either overlooked or ignored the more serious problem. If the Defendant's requested instruction was overbroad because it implied that duress could be a defense to both felony murder and premeditated murder, the State's requested instruction was equally overbroad because it implied that duress could be a defense to neither felony murder nor premeditated murder. The Eleventh Circuit failed to even note that the State's equally misleading instruction was actually given the jury at trial. By the Eleventh Circuit's own reasoning, if the Defendant's requested instruction was erroneous, the instruction given was equally erroneous. The panel also overlooked or ignored the fact that the defense had requested a legally correct modifying instruction that duress could be a defense to felony murder. The appellate court failed to note the fact that Parker had proposed a legally correct instruction, and that the trial court gave a legally incorrect instruction totally obliterating his defense.

During the trial, Robert Parker testified that he became afraid of Tommy Groover when Groover murdered Richard Padgett (T.1846, 1851, 1861, 1863, 1872, 1878-9, 1880-1, 1924, 1945, 1979). He testified that Groover threatened him, his wife, and his family with violent retribution (T.1847-8, 1849, 1865, 1942). He stated that he

believed that, when Billy Long got into Elaine's car, Long knew of Groover's murder plan (T.1868). Parker had seen Long with a gun in the past and was frightened of Long and Groover acting in concert (T.1868, 1880-1, 1962). On cross examination, Parker stated that he was coerced into doing everything he did (T.1979).

Instead of being exculpatory in nature, this evidence had the net effect of being incriminating and compelling a verdict of guilty, when the jury was told that duress was not a defense to homicide. The instruction allowed the prosecutors to argue that the Defendant was guilty based upon his own testimony. If the jury believed that the Defendant was coerced into participating in the "robbery" (*i.e.*, the taking of the necklace and ring), the jury would have had to return a verdict of guilty based upon the court's instructions. It is " . . . constitutionally impermissible for a judge to direct a verdict for the state." *Carella v. California*, 109 S.Ct. 2419, 2422 (1989) (Scalia, J. concurring). The trial court's rulings and instructions here had precisely that effect.

ARGUMENT IV

PETITIONER WAS DENIED DUE PROCESS WHEN THE PROSECUTOR WAS PERMITTED TO CROSS EXAMINE HIM ABOUT THE FACT THAT HE HAD CONFERRED WITH DEFENSE COUNSEL DURING A RECESS IN HIS TESTIMONY, ALTHOUGH THE CONFERENCE HAD BEEN AUTHORIZED BY THE TRIAL JUDGE AND ALTHOUGH THE PROSECUTOR OFFERED NO GOOD FAITH BASIS FOR ASSERTING THAT IT INVOLVED ANY CONDUCT LEGITIMATELY RELEVANT FOR IMPEACHMENT.

Robert Parker took the witness stand and testified in his own behalf. His testimony took about an hour and a

half on direct examination, and he had been on cross examination for an hour and five minutes when the trial court called a recess because the jury's supper had arrived (T.1955-6). The recess was intended to last for approximately forty minutes (T.1956) but was somewhat longer. Prior to the recess, the prosecutors objected to the Defendant being permitted to confer with defense counsel during the recess, and the trial court ordered defense counsel to refrain from doing so until the court was supplied with some law regarding the issue (T.1953-6).

During the recess, counsel supplied the court with a decision of the Florida Supreme Court, *Bova v. State*, 410 So.2d 1343 (Fla.1982), and was then permitted to speak to the Defendant. The trial resumed, as did the Defendant's cross examination. After some unrelated questions, the prosecutor proceeded as follows:

Q: All you have done for the last year is think about this, isn't it?
A: I've thought about it, yes.
Q: You are well coached, aren't you?
A: No sir.
Q: He's been coaching you day in and day out, hasn't he?
A: He's talked to me, he hasn't been coaching me.
Q: He even talked to you today during the recess, didn't he? (Objection overruled)
Q: You even talked to him during the recess a little while ago didn't you?
A: Yes sir I did. (Objection overruled)
Q: You have talked to him hundreds of times, haven't you?
A: Yes sir, several times.
Q: Several, three?
A: No, sir.

Q: More like a hundred?
A: Probably (J.A.26-9).

This Court has recognized that under certain circumstances a defendant in a criminal case has a Sixth Amendment right to consult with counsel during a recess in his trial, even when he is on the witness stand for cross-examination. *Geders v. U.S.*, 425 U.S. 80 (1976); *Perry v. Leeke*, 109 S.Ct. 594 (1989). Here, the trial court judge permitted the Defendant to exercise his right to counsel during the recess. It was a right, however, that was to cost Robert Parker dearly. The Defendant was not only subjected to attack because he exercised his right to consult with counsel, but the State also used the fact of consultation to infer impropriety on the part of his lawyer. Such conduct by the prosecutor served to undermine not only the Defendant's credibility, but that of defense counsel as well. Mr. Parker may well have thought twice about exercising his right to talk to his lawyer had he known that, by doing so, he was subjecting both himself and his attorney to a credibility attack.

This Court has repeatedly held that it is fundamentally unfair, and a violation of due process, for the Government to tell an accused that he may exercise a constitutional right, then penalize him for the use of it. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court held that the use of a defendant's post-arrest silence for impeachment purposes violated the due process clause of the Fourteenth Amendment:

> . . . while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the

> arrested person's silence to be used to impeach an explanation subsequently offered at trial. *Id.*, at 618.

In *Johnson v. U.S.*, 318 U.S. 189 (1943), the trial court mistakenly permitted the defendant to assert his Fifth An endment privilege while on cross examination. The prosecutor asked several questions to which the defendant asserted the privilege, and made much of the assertion in summation. This Court's comments in *Johnson* are applicable to the situation that arose in Robert Parker's trial:

> An accused, having the assurance of the court that his claim of privilege would be granted, might well be entrapped if his assertion of the privilege could then be used against him. His real choice might then be quite different from his apparent one . . . elementary fairness requires that an accused should not be misled on that score. *Id.*, at 197.

This Court described the problem succinctly:

> It is whether a procedure will be approved which deprives an accused, on facts such as these, of an intelligent choice between claiming or waiving his privilege. . . . It is the court to whom an accused properly and necessarily looks for protection in such a matter. When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. *Id.*, at 198-9.

An analogous situation arose in *Raley v. Ohio*, 360 U.S. 423 (1959). In *Raley*, the defendants were subpoenaed to appear before a state "Unamerican Activities Commission" and questioned concerning alleged subversive activities. The defendants were informed by the commission that they had a right to rely on the privilege against self incrimination guaranteed by the state constitution. They refused to answer questions on self incrimination

grounds and were then indicted for contempt for failure to answer. The state courts held that a state immunity statute deprived the defendants of the protection of the privilege against self incrimination, and that therefore there was no lawful basis for refusing to answer the questions. This Court vacated the defendants' convictions because " . . . to sustain the Ohio Supreme Court's judgment would be to sanction an indefensible sort of entrapment by the state – convicting a citizen for exercising a privilege which the state had clearly told him was available to him." *Id.*, at 426-7.

In *Geders*, the court noted in dicta that a prosecutor could cross examine a defendant as to the extent of any improper "coaching" during a recess, subject to the control of the court. *Geders, id.*, at 89. This Court had no cause to address the permissible nature of such an examination at that time. However, an interpretation of *Geders* that would permit an attack, such as the one here, on a defendant and his lawyer simply because they acted in conformity with the Constitution would effectively eliminate the right to counsel during a trial recess. It would become a right too costly to assert, because interrogations such as that which occurred in this case would occur routinely. What the prosecutor did here was to first accuse the Defendant of being "well coached," then ask him how many times he consulted with his lawyer, then bring out the fact of consultation during the trial recess as if it confirmed that the Defendant had in fact been improperly coached (J.A.26-9). There is nothing "case specific" about this sort of interrogation. This was a "generic" cross examination in which the Defendant was not even asked whether any coaching had occurred during the recess, nor was he asked what was discussed

during the recess. There was no attempt by the prosecutor to find out what actually had transpired. The accusation of coaching was made, then the fact that the Defendant had met with counsel during the recess was made known, as if to confirm that improper coaching did occur. This was not an attempt by the prosecutor to determine if there was any impropriety during the trial recess. It was, very simply, an attempt to infer impropriety from the mere fact of consultation with defense counsel.

A defendant can respond to such a tactic in only two ways. He can reply that he was not coached, as Mr. Parker did here. Such a denial, however, coming from the very subject of the impeachment, is unlikely to be given much weight by the jury when the prosecutor implies that the mere fact of consultation is evidence of impropriety. The only other means of replying to the coaching allegation would be for defense counsel to take the witness stand and testify as to what occurred between himself and his client during the recess. This, of course, would run afoul of well settled ethical considerations. See, Rule 4-3.7, Rules Regulating The Florida Bar. For counsel to appear as a witness confuses the roles of witness and advocate, and skews the way that a jury views the case. Additionally, for defense counsel to testify would necessarily result in the disclosure of privileged communications and assessments by counsel and by the defendant of how the trial is going and other sensitive subjects, none of which should be made an issue before the jury.

Under appropriate circumstances, of course, this Pandora's Box may have to be opened. But the prosecutor should not be permitted to open it with no justification

whatsoever. Before penalizing or invading attorney-client consultation, a prosecutor should be required to proffer his questions to the defendant outside the presence of the jury or, otherwise demonstrate a good faith basis for a belief that some sort of improper coaching actually occurred. This Court has refused to presume that defense counsel will engage in unethical coaching if defense lawyers are permitted to meet with their clients during a trial recess. *Perry, id.*, at 600. To permit the type of interrogation that was conducted here, would be to jump to precisely that assumption. Unquestionably, that is the very assumption that the prosecutor sought to convey to the jury: that defense counsel must have engaged in unethical coaching if he met with the defendant during a recess in his cross examination.

Requiring a proffer in a brief hearing outside the presence of the jury would not unduly delay a trial. Indeed, Section 90.104(1)(b), Florida Statutes, contemplates an "offer of proof" to the trial judge in order to make the "substance of the evidence" known to the court before an appeal may be had from a ruling excluding evidence. Section 90.104(2) requires that a court conduct such proceeding "to the maximum extent practicable" so as to prevent inadmissible evidence from being presented to the jury. Most states require a good faith basis for impeaching questions and disapprove of cross examination by innuendo. See, for example, *Castillo v. State*, 466 So.2d 7 (Fla.3d DCA 1985); *Commonwealth v. State*, 446 N.E.2d 1041 (Mass.1983). Thus, a requirement that a prosecutor ask questions concerning any alleged "coaching" outside the presence of the jury would be no departure from established practice. Such a procedure would permit the trial judge to determine if there is a valid basis for the allegation, and to determine whether the prejudice of the

questioning itself would outweigh the probative value of the proposed questions and answers.

Here, of course, the prosecutor neither proffered any questions outside the presence of the jury, nor did he proffer any good faith basis that would support his allegations of coaching. The prosecutor simply used the fact that the Defendant had conferred with counsel to insinuate that the Defendant was telling a story invented by his lawyer.

Credibility in this case was all important. The trial was essentially a "swearing contest" between two co-defendant accomplices and the Defendant himself. Under these circumstances, such an attack upon the Defendant's credibility was unquestionably prejudicial, and cannot be considered harmless. The appropriate remedy is reversal for a new trial.

CONCLUSION

If relief is granted on Argument IV above, Mr. Parker should receive a new trial. If relief is granted as to Arguments II or III, Mr. Parker should receive a new trial as to Count II of the Indictment. If relief is granted under Argument I, Mr. Parker's death sentence should be vacated.

Respectfully submitted,

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Florida Statute 921.141 Sentence (1981)

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. –

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. – Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United

States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. – After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. – Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported

by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE. – The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES. – Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the

unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES. – Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Supreme Court, U.S.
FILED
SEP 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1989
CASE NO. 89-5961

ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENT

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53 pp

QUESTIONS PRESENTED FOR REVIEW

(Restated)[1]

I. Is the application of Florida's jury override standard in an individual case subject to Eighth Amendment review, and, if so, what standard of review is applicable?

II. Is a constitutional claim procedurally barred if it is not raised on direct appeal or in any collateral or post-conviction proceeding in the state and federal trial courts?

III. Where the jury was permitted to convict Petitioner of first degree murder under either a felony murder or premeditated murder theory, and where

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[1] The Petitioner's questions, as stated in his brief, differ from the questions set forth in his petition for writ of certiorari. The Respondent has restated the questions to bring the issues into line with the petition. In addition, Mr. Parker has affirmatively abandoned the fifth claim asserted in his original petition.

"duress" is not a recognized defense to murder, is it harmless error to disallow a defense requested jury instruction on duress?

IV. May a prosecutor whose cross-examination of the defendant is interrupted by a recess subsequently question the defendant about his consultation with his attorney during the recess?

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OPINIONS BELOW

The Petitioner's statement is accepted.

STATEMENT OF JURISDICTION

It is submitted none of the reviewing questions upon which Parker seeks certiorari review require further review. Respondent would submit summary affirmance is mandated or a determination that certiorari review was improvidently granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's statement is accepted. The Respondent would add the following:

(1) This case involves the application of 28 U.S.C. §2254, a copy of which is attached.

(2) Florida Rule of Appellate Procedure 9.330(a) states, in relevant part:

A motion for rehearing or for clarification of decision may be filed within 15 days of an order or within such other time set by the court. The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order. A reply may be served within 10 days of service of the motion.

STATEMENT OF THE CASE

Mr. Parker's statement of the facts is not acceptable. Therefore, the following pertinent facts are provided to clarify those circumstances before the Court.[2] The Respondent relies upon the facts as reported by the Eleventh Circuit (J.A. 147, et.seq.), to-wit:

> This case involves three murders committed in Duval County, Florida on February 6-7, 1982. Parker, then a drug dealer, was known to have a violent temper and to possess several firearms. The day the murders began, Parker became irritated because many of his customers were not paying their accounts. He decided to reinforce his reputation as a tough dealer and began by throwing a rope over a tree limb and threatening to hang Tommy Groover, one of his distributors, if the

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[2] Parker submits undisputed facts in his brief which do not accurately reflect the facts as discerned by the Court of Appeals or reflect their full content based on the trial record.

debts were not paid. The next day Parker again threatened to kill Groover if he did not recover the money. Taking Parker at his word, Groover set out with Billy Long, another of Parker's acquaintances, to collect some of the debts. They first stopped at a local nightclub. There they found Richard Padgett, who was behind in his drug debts, with his girlfriend Nancy Sheppard. The two men persuaded Padgett and Sheppard to accompany them to Parker's trailer, where Parker and his ex-wife, Elaine Parker, were waiting.

When the group arrived at the trailer, Parker took Padgett outside for a 'discussion.' A shot was fired. When the two came back inside, Parker had a pistol in his belt. Sheppard became alarmed and offered her necklace and ring to Parker as payment for Padgett's debt. Parker refused Sheppard's offer; instead, Long drove her home. The rest of the group accompanied Padgett as he tried to collect money to pay his debt. When he was unsuccessful, Padgett was taken to a junkyard owned by Parker's father. At the junkyard, Groover beat

Padgett. Thereafter, the group drove to a secluded rural area. The three men exited the car and Padgett fell to his knees and begged for mercy. With Parker's aid, Groover shot Padgett to death and Parker and Groover threw his body in a ditch.

Parker, Groover, and Elaine cleaned up at the junkyard and drove to a bar where they met Jody Dalton, Groover's former girlfriend. Ms. Dalton decided to accompany them. The group first stopped to throw the murder weapon into a river. Dalton witnessed this act. Next, they returned to Parker's trailer and dropped Dalton off while the rest of the group drove to the residence of Joan Bennett. When they returned with Ms. Bennett, Parker became angry because Dalton had used some of his drugs without his permission. Parker and Groover decided to 'get rid' of Dalton and drove the entire group to an area known as Donut Lake. There Dalton was stripped, taunted, beaten, and kicked as she begged for mercy. Groover, again with Parker's aid, shot Dalton to death. The two men tied up her body with rope and concrete blocks and threw it into the lake.

During the trip back, Parker and Groover discussed killing Bennett because he had witnessed the Dalton murder. Elaine convinced the two men that Bennett could be trusted and they drove Bennett home. The three concluded, however, that Sheppard could link them to Padgett's murder and decided to kill her. They first found Long, who directed them to Sheppard's home. Elaine then tricked Sheppard into accompanying the group by telling her that Padgett was 'high' and wanted to see her.

The group soon arrived at the scene of the Padgett murder. Parker took Long to the ditch and asked him if he knew what was going on. When he replied that he did not, Parker told him that 'either you kill Nancy or I will kill you.' Next, Parker took Sheppard to the ditch. Upon seeing Padgett's body, she fell to the ground and exclaimed 'Oh, my God!' Elaine handed Long a pistol and said, 'You better do it or he'll kill you too.' Long took the pistol and shot Sheppard in the head. Parker and Groover screamed, 'Shoot her again, she's still

breathing.' Long shot her twice more. Parker then cut her throat with a knife and took her necklace and ring.

Additional factual averments require clarification.

Groover was collecting drug debts specifically so he could pay money to Parker. (J.A. 148).

When Groover shot Jody Dalton, he (Parker) shouted "What are you doing you crazy m____ f_____?". This comment, however, taken in context, was an expression of concern by Parker over the noise being made by Groover (and the danger they would get caught), not concern over the fate of Ms. Dalton.

After Elaine Parker lured Nancy into their car, Parker told Nancy that Richard Padgett wanted to see her. When they arrived at the murder scene, Parker asked Long if he knew what was going to happen. When Long said he did not,

Parker laughed and told Long that he would soon find out. Parker, who had previously shot Long and thus scared him, ordered Long to shoot Nancy or get killed along with her. Long shot Nancy and then Parker personally slit Nancy's throat. Parker then took Nancy's ring and necklace. Parker also cleaned off the knife.

Mr. Parker raises four specific issues, the facts relevant to each being as follows:

Facts: Issue I

The issue addressed by the Eleventh Circuit was not the propriety of the Florida Supreme Court's override decision but, rather, whether a federal district court judge could substitute his own sentencing override decision for that of the state courts (J.A. 157). The court held:

> The district court decision suggests that its grant of relief was influenced by dissatisfaction with the Florida Supreme Court's application of the **Tedder** standard to the facts in this case. **Spaziano** warns, however, that federal review for the arbitrary or discriminatory imposition of the death penalty must not devolve into second guessing the Florida courts on questions of state law, particularly on whether the trial judge complied with the mandates of **Tedder**.

In sentencing Parker to death for the Sheppard murder, the trial judge considered all statutory and non-statutory mitigating evidence (J.A. 158). The judge found no mitigating circumstances but found the following aggravating factors:

(1) Parker's prior conviction for a violent felony.

(2) The murder was committed during a robbery.

(3) The murder was committed to avoid arrest.

(4) The murder was committed for pecuniary gain.

(5) The murder was heinous, atrocious and cruel.

(6) The murder was cold, calculated and premeditated.

In upholding the trial court's override after careful review pursuant to the state law standards of **Tedder v. State**, 322 So.2d 908 (Fla. 1975), the Florida Supreme Court struck factors (2) the murder was committed during a robbery, and (5) the murder was heinous, atrocious and cruel.

The mitigation offered by Parker was:

(1) Parker's mother testified that Parker had a normal childhood, he was the baby of the family, and that he was spoiled. The family was close knit.

Parker's father drank but was never mean to the children, and left any discipline to her. She also testified that Parker was using dope by the time he was fifteen, and that Parker broke her arm when she tried to stop him from fighting with his brother.

(2) Parker's grandmother also testified to his normal childhood.

(3) Parker's sister testified that Parker caused his mother a lot of trouble once he began abusing drugs and had to be placed in a juvenile home.

(4) Parker offered two other character witnesses and an evangelist's testimony that Parker "found God".

(5) Parker offered evidence of Groover's death sentences for killing Padgett and Dalton.

The state courts did not specifically address the specifics of this non-

statutory mitigation but, the Eleventh Circuit addressed this evidence by noting that the weight to be afforded this evidence was a state court decision and that mere silence would not be interpreted as a failure to consider the evidence. (J.A. 159-160).

Facts: Issue II

During trial, Parker requested a jury instruction on the "independent intervening act" defense to felony murder. The trial court did not grant the request but gave standard jury instructions on felony murder which substantially covered the subject.

On direct appeal, Parker modified his argument to suggest that he was "not allowed" to argue certain defenses to the jury due to the court's rejection of his instructions. The Florida Supreme Court disposed of the issue by finding

the lack of record evidence supporting any "independent act" instruction. (J.A. 66).

Parker moved for rehearing, including in his motion a de novo allegation that the evidence of felony murder was insufficient, stating:

> This Court, in page 6 of its own opinion, ruled that there was no felony involved in the Sheppard murder and struck felony murder as an aggravating circumstance. The lower court was therefore incorrect in instructing the jury on felony murder.

(J.A. 82).

The Florida Supreme Court denied rehearing in a summary order without issuing a written opinion. (J.A. 87).

When Mr. Parker filed his habeas corpus petition in federal court, the argument regarding the "failure" to give the requested jury instruction on "independent act" was transformed into a

claim that the evidence at trial was "insufficient" to support a felony murder instruction. To overcome the application of procedural bar to this claim, Parker argued:

> The fact that the defendant was convicted based upon erroneous jury instructions that were unsupported by the evidence, and the contention that this violated due process, were clearly raised in the Defendant's Motion for Rehearing in the Florida Supreme Court. This was an issue that could not have been raised earlier because it was not ripe for review until the Florida Supreme Court issued its opinion finding the evidence of the felony murder aggravating circumstances was insufficient.

The federal district court found Parker's claim to be procedurally barred (J.A. 103).

Parker appealed to the Eleventh Circuit, but again mutated his claim into the argument that his "felony

murder conviction" was erroneous under **Stromberg v. California**, 283 U.S. 359 (1931).

The Eleventh Circuit noted that the "**Stromberg**" approach was not argued at trial, on appeal, or even in the federal district court (J.A. 162). To the extent that the felony murder issue in general was being argued, the court relied on Parker's admission that he did not raise the issue until he filed for rehearing in the Florida Supreme Court (J.A. 163), and determined the claim was procedurally barred (J.A. 163).

Facts: Issue III

Although "duress" is not a defense to murder in Florida, Parker requested a "duress" instruction at the close of trial. Parker provided no relevant legal authority for his request, and his request was denied.

The Eleventh Circuit noted that Parker was prosecuted under a premeditated murder theory as well as a felony murder theory (J.A. 167). The Eleventh Circuit found that Parker's "duress" instruction was misleading because it implied that duress was also a defense to premeditated murder (J.A. 167). Thus, the Eleventh Circuit said, the trial court did not err by refusing to give an incorrect instruction (J.A. 167).

Facts: Issue IV

The trial court interrupted the State's cross-examination of Parker due to the arrival of the jury's supper. Parker took advantage of this break to confer with his attorney. The State questioned Parker as to what was discussed with his counsel during the break. Defense counsel objected to this

inquiry. Parker's counsel had questioned State witnesses in the same manner.

Collateral relief was denied by the lower federal courts on the authority of **Geders v. United States**, 425 U.S. 80 (1976). On appeal, the Eleventh Circuit upheld the district court with a single citation to **Geders**. (J.A. 169-170).

SUMMARY OF ARGUMENT

It is submitted that certiorari review may have been improvidently granted to review procedurally barred claims and issues of state, rather than federal, law.

Regarding Mr. Parker's first point, the Respondent submits that the Eleventh Circuit did not err in following the dictates of **Spaziano v. Florida**, 468 U.S. 447 (1984). Federal courts, even if convinced that a state has misapplied its own law in passing sentence, simply lack the authority to substitute their own sentencing decisions for those of the state courts. **Lewis v. Jeffers**, ____ U.S. ____, 111 L.Ed.2d 606 (1990); **Barclay v. Florida**, 463 U.S. 939 (1983).

Mr. Parker's second issue seeks federal abolition of Fla.R.App.P. 9.330, which precludes appellants from arguing

issues in a motion for rehearing which were not raised on appeal. Mr. Parker cannot support his request with any relevant law.

The third issue is a request for this Court to recognize "duress" as a defense to murder in the state of Florida, thus compelling jury instructions on said defense. Again, Parker offers no support for the proposition that certiorari should be used to this end.

The fourth issue seeks reversal of this Court's controlling decisions in **Geders v. United States**, 425 U.S. 80 (1976), and **Perry v. Leeke**, 488 U.S. ____, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), apparently under a theory that the State does not have the right to cross examine a witness, including a defendant, on the issue of "coaching".

ARGUMENT

ISSUE I

THE FLORIDA SUPREME COURT'S "TEDDER RULE" FOR REVIEWING JURY OVERRIDE DEATH SENTENCES IS A RULE OF STATE LAW NOT SUBJECT TO FEDERAL REAPPLICATION

The Petitioner, Robert Parker, contends that Eighth Amendment and general due process concerns require federal courts to resentence state prisoners whenever they detect a misapplication of state law by said state courts. Since Mr. Parker's position is completely at odds with established decisional law governing §2254 litigation, it is submitted he cannot prevail.[3]

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[3] Parker's brief includes a **de novo** claim of misapplication of Florida's "**Elledge** Rule" (governing cases where non-statutory aggravating factors are relied upon). **Elledge v. State**, 346 So.2d 998 (Fla. 1977). No such error occurred in this case. Moreover, misapplication of **Elledge** would not

The idea that federal judges either can or should resentence state prisoners under their own personal interpretation of state law was rejected in **Gryger v. Burke**, 334 U.S. 728, 731 (1948). In refusing to reapply Pennsylvania law, this Court said:

> It is neither clear that the sentencing court so construed the statute, nor if he did that we are empowered to pronounce it an error of Pennsylvania law. . . . And in any event it is for the Pennsylvania courts to say under its law what duty or discretion the court may have had. Nothing in the record impeaches the fairness and temperateness with which the trial judge approached his task. His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that

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compel relief. **Barclay v. Florida**, 463 U.S. 939 (1983). Parker's citation to **Dobbert v. Florida**, 432 U.S. 282 (1977), is misplaced, since Dobbert only reviewed the "**ex post facto**" application of Florida law.

> the trial court acted under an interpretation of the state law different from that which we might adopt and then set our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every decision by a state court on state law would come here, as a federal constitutional question.

This principle was carried forward in **Lewis v. Jeffers**, 497 U.S. ____, 111 L.Ed.2d 606, 623, 624 (1990), where the Court, after quoting the admonition in **Godfrey v. Georgia**, 446 U.S. 420, 450 (1980), that federal courts should not "peer majestically over the [state] court's shoulder so that [they] mighty second guess its interpretation of facts . . .", held:

> Moreover, a federal court should adhere to the Jackson standard even when reviewing the decision of a state appellate court that had

> independently reviewed the evidence, for the underlying question remains the same: If a State's aggravating circumstances adequately perform their constitutional function, then a state court's application of those circumstances raises, apart from due process and Eighth Amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case -- including a de novo finding by an appellate court that a particular offense is "especially heinous . . . or depraved" -- is arbitrary or capricious if and only if no reasonable sentencer could have so concluded. Indeed, respondent agrees that "a state court's 'especially heinous . . . or depraved' finding, *insofar as it is a matter of state law*, is reviewable by the federal courts only under the 'rational factfinder' rule of Jackson v. Virginia." Brief for Respondent 95-96 (emphasis added; footnote omitted).

In **Spaziano v. Florida**, 468 U.S. 446 (1984), this Court, after upholding the constitutionality of Florida's jury

override procedure, absolutely refused to grant to Spaziano any review of the specific application of the "**Tedder** Rule" in his case. As the court recognized, jury sentencing is not required by the Constitution, so any decision to override a jury's non-binding, non-constitutional sentencing suggestion does not open the gates to federal review. **Hildwin v. Florida**, 490 U.S. ____, 104 L.Ed.2d 728 (1989).

In this regard, it should be noted Justice Scalia's concurring opinion in **Walton v. Arizona**, 497 U.S. ____, 111 L.Ed.2d 511, 539 (1990):

> Moreover, the Eighth Amendment's prohibition is directed against cruel and unusual **punishments**. It does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment. As the Chief Justice has observed, '[t]he prohibition of the Eighth Amendment relates to the character of

> the punishment, and not to the process by which it imposed.' **Gardner v. Florida**, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting). Thus, the procedural elements of a sentencing scheme come within the prohibition, if at all, only when they are of such a nature as systematically to render the infliction of a cruel punishment 'unusual'.

Applying this approach to Mr. Parker's case, the records shows the trial judge, as sentencer, weighed very significant (statutory) aggravating sentencing factors against **de minimus** mitigating evidence.[4]

The trial court's application of Florida law was carefully reviewed by

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[4] Note Justice Scalia's concurrence in **Walton, supra**. Unlike defendants who claim poverty or ill health as "mitigation", Parker was a well-cared-for (even spoiled) child who enjoyed a normal childhood and who suffered from no mental disorders. Parker's other mitigation was that he had become religious.

the Florida Supreme Court under its judicially crafted "**Tedder** Rule". **See Tedder v. State**, 322 So.2d 908 (Fla. 1975). The Florida Supreme Court found that the facts supporting Parker's sentence were indeed so clear and convincing that no reasonable person could differ. (J.A. 71). Thus, as concluded in **Spaziano, supra**, the Florida Supreme Court's constitutionally acceptable review of capital cases was accepted and the particularities of the facts as to whether death was the appropriate sentence must be left to the Florida court to resolve as it did. Nothing in this record requires a retreat from **Spaziano**. **Hildwin v. Florida**, 490 U.S. ____, 104 L.Ed.2d 728 (1989).

What Mr. Parker seeks is a major expansion of §2254 at a time when

Congress and this Court are calling for restraint and reform.

The history of §2254, of course, has been marked by repeated expressions of support for the concepts of comity and federalism. **See Rose v. Lundy**, 455 U.S. 509 (1982); **Wainwright v. Sykes**, 433 U.S. 72 (1977); **Engle v. Isaac**, 456 U.S. 107 (1982).

Since 28 U.S.C. §2254 is merely a statutory creation, it is limited by the Constitution and cannot be applied in a manner violative of any constitutional provision. **Schneckloth v. Bustamonte**, 412 U.S. 218 (1972); **Murray v. Giarratano**, ____ U.S. ____, 106 L.Ed.2d 1 (1989); **Pennsylvania v. Finley**, 481 U.S. ____, 95 L.Ed.2d 539 (1987); see also Bator, **Finality in Criminal Law and Federal Habeas Corpus for State Prisoners**, 76 Harvard Law Review, No. 3 (1963).

Parker does not challenge the constitutionality of Florida's jury override "system" as unconstitutional under the Eighth Amendment. Indeed, he confesses that its constitutionality has been upheld. **Proffitt v. Florida**, 428 U.S. 242 (1976); **Spaziano v. Florida**, 468 U.S. 4446 (1984). **Hildwin v. Florida**, 490 U.S. ____, 104 L.Ed.2d 728 (1986); **Barclay v. Florida**, 463 U.S. 939 (1983). His complaint, similarly, does not challenge the death penalty itself or allege that it is "systematically" misapplied. What Mr. Parker says is that he disagrees with the Florida Supreme Court's sustaining of his death sentence on direct appeal, and he demands federal resentencing, or a second appeal, with the federal court reapplying state law.

It is abundantly clear that Mr. Parker's request is contrary to the settled law governing the scope of §2254 review and, the Eleventh Circuit was correct in recognizing this effort and rejecting it as erroneous. Parker is not entitled to relief. (J.A. 157-158).

ISSUE II

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT PETITIONER'S "STROMBERG" CLAIM WAS PROCEDURALLY BARRED

Mr. Parker strives mightily to create the illusion that his "**Stromberg**"[5] claim was (1) either argued below and in state court, or (2) was preserved in a de facto sense by the Florida Supreme Court.

Parker's argument on direct appeal to the Florida Supreme Court went to the denial of a jury instruction, not to the concept of "felony murder" or "general versus specific verdicts". On rehearing, Parker briefly questioned the sufficiency of the evidence, but again he did not argue any even remotely

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[5] **Stromberg v. California**, 283 U.S. 359 (1931).

fashioned **Stromberg** theory.[6] On state collateral attack, Parker did not raise the issue at all. In federal district court, Parker confessed that he did not raise the issue of "sufficiency of the evidence" on direct appeal because he never anticipated the issue. As for "**Stromberg**", no mention of that case was made in district court either. Since **Stromberg** was not argued to the district court, no ruling on the **Stromberg** issue was entered there. The first references to either **Stromberg** or its holding, came in Parker's Eleventh Circuit brief. Therefore, the circuit court's decision is correct when it states that the issue is barred for not having been raised. (J.A. 162).

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[6] See Fla.R.App.P. 9.330, (barring the argument of new issues on rehearing).

To circumvent procedural bar problems, Parker seeks refuge in the allegation that the Florida Supreme Court's review of the "entire record" in capital cases means that the court both conjures up and resolves all possible legal (appellate) issues, thus eliminating any subsequent problems with procedural default. In "support" of this untenable position, Parker cites to **Elledge v. State**, 346 So.2d 998 (Fla. 1977). Parker ignores, however, **Brown v. State**, 392 So.2d 1327, 1331 (Fla. 1981), which explained **Elledge** as follows:

> This Court's role after a death sentence has been imposed is "review", a process qualitatively different than "imposition". It consists of two discreet functions. First we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our caselaw . . . The second

> aspect of our review process is to ensure relative proportionality among death sentences . . . Neither of our sentence review functions, it will be noted, involves weighing or re-evaluating the evidence.

Parker's "**Stromberg**" claim has nothing to do with this analysis. Instead, it is a challenge based upon **Stromberg**'s condemnation of general verdicts in highly particularized situations.

In **Stromberg**, a defendant was convicted by general verdict of violating a California law which outlawed the flying of red flags as (1) a political statement, or (2) an invitation to, or (3) stimulus to "anarchistic action". Since (1) was an absolute First Amendment right, it was possible that the "general verdict" convicted Stromberg of a constitutionally protected act. Post-

Stromberg cases also involved laws governing multiple activities, some of which were protected or not illegal.

In this case, Parker was convicted of first degree murder. As the Florida Supreme Court "has repeatedly explained", **Green v. State**, 475 So.2d 235, 236 (Fla. 1985), there is only one crime of "first degree murder". First degree murder is the intentional killing of a human being under §782.04, Fla.Stat., and "intent" is proven by showing either premeditation or the commission of an enumerated felony. Thus, Florida uses the concepts of premeditation and felony-murder as vehicles for proving the same crime, first degree murder.

It is clear that a **Stromberg** analysis, had one been performed, would have answered the question of whether

either "form of murder" was a constitutionally protected activity in the negative.

The only arguable issue, abandoned by Parker, was sufficiency of the evidence under **Jackson v. Virginia, supra**.

Parker would base a **Jackson** claim on the Florida Supreme Court's rejection of a statutory aggravating factor during review of his sentence. Here, again, Parker misinterprets the facts.

The Florida Supreme Court rejected the sentencing factor of "murder during a robbery". That sentencing factor, however, does not cover every kind of "felony murder" or completely prohibit a conviction for "felony murder" (to borrow Parker's term). Under §782.04, Fla.Stat., felony murder would include murders committed while engaged in trafficking drugs or in kidnapping, two

crimes established here. Thus, the mere rejection of "robbery" as an aggravating sentencing factor does not mean that no evidence (guilt phase) of "felony" murder was on the record.[7]

In sum, therefore, it is clear that Parker's claim is not only procedurally barred, it is devoid of legal or factual merit.

The Eleventh Circuit, in declining to review this claim "on the merits", due to its procedurally barred status (J.A. 157, et.seq.), clearly did not err.

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[7] The sentencer may consider evidence of any enumerated felony even if the enumerated felony was not charged as a distinct crime during the "guilt phase". **Ruffin v. State**, 397 So.2d 277 (Fla. 1981); **Brown v. State**, 473 So.2d 1260 (Fla. 1985); **Swafford v. State**, 533 So.2d 270 (Fla. 1988). Also, Florida law permits the finding of a felony murder aggravating factor even if a precise penalty phase jury instruction on the underlying felony is not given. **James v. State**, 455 So.2d 786 (Fla. 1984).

ISSUE III

THE PETITIONER IS NOT ENTITLED TO FEDERAL CREATION OF A "DURESS" DEFENSE TO FIRST DEGREE MURDER FOR THE STATE OF FLORIDA

The State of Florida stands as one of the majority of jurisdictions which does not recognize "duress" as a defense to first degree murder.[8] Even at common law, "duress" was not recognized as a valid defense.[9]

Mr. Parker's contention that Florida recognizes "duress" as a defense to first degree murder, if the theory of the prosecution is "felony murder", is simply not correct.

In **Hawkins v. State**, 436 So.2d 44 (Fla. 1983), the Florida Supreme Court did not adopt the "duress" defense but

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[8] **See** LaFave, **Substantive Criminal Law**, §5.3 (1986).

[9] **Id.**

rather equated Hawkins' claim with the "non-triggerman" defense of **Enmund v. State**, 399 So.2d 1362 (Fla. 1981). Hawkins, a voluntary participant in the underlying crimes, could not allege domination by codefendant Troedel.[10]

In Parker's cited case of **Wright v. State**, 402 So.2d 493 (Fla. 3rd DCA 1981), the lower appellate court explicitly recognized the absence of a "duress" defense to murder even though, in a footnote citing a Michigan case, the court questioned whether "duress" could affect the intent to commit an underlying felony which, in turn, results in a murder. No opinion cn the effect of this "two-step-removed lessened intent" was given.

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[10] Troedel tried to claim domination by Hawkins, which was also rejected. **Troedel v. State**, 462 So.2d 392 (Fla. 1984).

In **Chestnut v. State**, 505 So.2d 1352 (Fla. 1st DCA 1987), the cited discussion appears in a "concurrence and dissent" by a single judge, not in the court's opinion. Even so, citing to **Cawthon v. State**, 382 So.2d 796 (Fla. 1st DCA 1980), and to **Wright v. State**, 402 So.2d 493 (Fla. 3rd DCA 1981), the judge agreed that duress is not a recognized defense to murder in Florida. Even though Judge Ervin was willing to ponder "duress" as a defense to the underlying felony, he wrote:

> Nevertheless, I see no need to decide whether the defense of duress is applicable to the offense of felony-murder, because appellant did not establish, as a precondition to the admissibility of such defense, that the danger to him was either imminent or impending.

Supra, at 1354.

Finally, in **Goodwin v. State**, 405 So.2d 170 (Fla. 1981), the approved "duress" instruction related to a charge of kidnapping, but not to murder. The comment in the **Goodwin** opinion regarding the "duress instruction" does not relate to an instruction on the crime of murder.

Since duress is not a defense to premeditated or to felony murder in Florida (an issue not decided by the Eleventh Circuit), Parker was not entitled to an instruction on "duress".[11]

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[11] The Eleventh Circuit found that even if Florida had a "duress" defense, Parker's proposed instruction was poorly drafted and appeared to set up duress as a defense to premeditated murder as well. Thus, notwithstanding Mr. Parker's general "duress" issue, his specific instruction was improper.

ISSUE IV

THE PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE COURT'S DECISION TO ALLOW CROSS EXAMINATION ON THE TOPIC OF "COACHING" BY COUNSEL, DURING A RECESS

Parker states:

> This Court has recognized that under certain circumstances a Defendant in a criminal case has a Sixth Amendment right to consult with counsel during a recess in his trial, even when he is on the witness stand for cross examination. **Geders v. U.S.**, 425 U.S. 80 (1975); **Perry v. Leeke**, 109 S.Ct. 594 (1989).

Petitioner's Brief, p. 47.

In **Geders v. United States**, 425 U.S. 80 (1975), this Court dealt with a court order prohibiting a defendant from consulting with counsel during an overnight recess called while the witness was testifying. While declaring that the defendant had the right to counsel, this Court also held that the

State had the right to cross examine the defendant on the issue of coaching. Thus, Parker's reliance on **Geders** is misplaced.

If Parker's reliance upon **Geders** is misplaced, his citation to **Perry v. Leeke**, 488 U.S. ____, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), is mystifying.

In **Perry v. Leeke**, this Court held that in a "short recess" case, where the defendant is on the witness stand (and thus "just like any other witness"), the defendant does not have the right to confer with his lawyer. **Perry** contains no restriction on cross examination. It does make clear the fact that no Sixth Amendment rights are implicated in this situation.

Under **Perry**, therefore, Mr. Parker actually received a benefit that the trial court was not required to bestow;

the chance to confer with defense counsel during a short (supper) break in his cross examination.

Mr. Parker suggests that government counsel should be required to proffer some evidence of "coaching" before being allowed to cross examine on that issue. The problem with that proposal is that the State could never make such a proffer because it has no access to attorney-client communications and cannot listen in on their conferences.

Perry recognizes the value of cross examination in determining the truth in criminal cases. **Perry** also recognizes the State's right to conduct a meaningful cross examination. A defendant who takes the witness stand is in the same position as any other witness. If there is no right under the Sixth Amendment to consult with counsel

during said testimony, then clearly there is no Sixth Amendment violation involved in permitting inquiry, on cross examination, into any unprotected consultation with counsel.

CONCLUSION

Mr. Parker has failed to establish any basis for relief from either his convictions or his sentences. The opinion of the Eleventh Circuit should be affirmed in all respects.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1990

ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Respondents.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Citations to the Joint Appendix are designed (J.A. ___). Citations to the trial transcript are designed (T.___). Citations to the state trial proceedings, called Record on Appeal, are designed (R.___). Citations to Petitioner's Brief are designed (P.B.___). Citations to the Respondent's Brief are designated (R.B.___). Emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE

The State grounds its entire brief on "the facts as reported by the Eleventh Circuit" (R.B.3), which it sets forth *verbatim*. The Eleventh Circuit explicitly took this version of the facts from the trial judge's sentencing order (J.A.147). For several reasons, the facts recited in the trial judge's sentencing order are an inappropriate starting point for constitutional analysis in this case.

First, Petitioner's Argument I in this Court (P.B.15-35), invokes the three-step process of constitutional review endorsed in *Lewis v. Jeffers*, 110 S.Ct. 3092 (1990), in challenging the standards applied by the Florida Supreme Court to uphold his death sentence despite a jury recommendation of life. Petitioner's argument is that:

> (1) The *Tedder* standard – the Florida Supreme Court's crucial test for approving or disapproving death sentences based on a "jury override" [see *Spaziano v. Florida*, 468 U.S. 447, 465-66 (1984)] – violates the constitutional rule of *Maynard v. Cartwright*, 486 U.S. 356 (1988), *unless* it is saved by the Florida Supreme Court's limiting construction which requires the appellate court to examine the record and determine whether there is any "reasonable basis" for the jury's life recommendation. *E.g.*, *Malloy v. State*, 382 So.2d 1190 (Fla.1979); *Richardson v. State*, 437 So.2d 1091, 1095 (Fla.1983).

(2) The trial judge and the Florida Supreme Court did not apply the limiting, "reasonable basis" construction in imposing and approving Petitioner's death sentence; thus, the sentence violates the rule of *Godfrey v. Georgia*, 446 U.S. 420 (1980).

(3) Petitioner's death sentence *could* not be approved on this record under the "reasonable basis" construction without offending the "rational factfinder" test of *Lewis v. Jeffers, supra*.

Because the "reasonable basis" construction of *Tedder* focuses on the inquiry whether there is a reasonable basis in the record for the jury's life recommendation, and *not* upon the view of the facts taken by the trial judge in his sentencing order (see cases cited at P.B.21, 28-9), the starting point for adjudicating these constitutional issues cannot possibly be the factual findings made in Judge Olliff's sentencing order. See, most recently, *Cheshire v. State*, ___ So.2d ___, 15 FLW S504 (Fla.1990), re-affirming the "reasonable basis" test and noting that " . . . under *Tedder* the trial court's role is solely to determine whether the evidence in the record was sufficient to form a basis upon which reasonable jurors could rely in recommending life imprisonment." Notably, the State's brief nowhere questions Petitioner's description of the Florida case law establishing the "reasonable basis" construction; it nowhere suggests that a "reasonable basis" analysis begins – let alone ends – with the trial judge's sentencing findings; and it nowhere offers any *other* narrowing construction of the *Tedder* rule than the "reasonable basis" construction.

Second, the Florida Supreme Court, on direct appeal, did not treat the facts of the case as settled by the trial judge's sentencing order. It recited its own, more accurate summary of the facts (J.A.64-65). Indeed, it specifically rejected portions of the trial judge's sentencing order concerning two aggravating circumstances (J.A.70-71).

Third, the trial judge's sentencing order is replete with plain factual errors. Not only the Florida Supreme

Court, but the federal District Court as well found it necessary to provide a summary of the facts that differs substantially from those recited in the sentencing order (J.A.93-99). One glaring error is the trial judge's description of the Padgett homicide:

> The three men exited the car and Padgett fell to his knees and begged mercy. Groover shot Padgett to death as Parker aided and abetted the murder. (J.A.40).

Nowhere in the trial record is there any testimony, physical evidence, or argument that Padgett fell to his knees and begged for mercy before Groover shot him. The only direct testimony as to how Padgett was killed was provided by Robert Parker himself. Parker did not see what position Padgett was in at the time that he was shot, and no one testified that Padgett fell to knees and begged for mercy. The uncontradicted evidence was that Parker was sitting in the car at the time that Padgett was shot by Groover. Parker testified that he heard a shot, got out of the car, and saw Groover standing over Padgett's body with a gun (T.1844-5). Groover told Parker to back off, and Parker got back into the car (T.1845-6). Indeed, the evidence tended to show that Padgett did *not* know he was going to be killed (T.2476-7, 2496). The Florida Supreme Court ruled that this evidence was sufficient to convict Parker of felony murder in the Padgett homicide, because he assisted in a kidnapping. *Parker v. State*, 458 So.2d 750, 752-3 (Fla.1984). Nevertheless, Judge Olliff repeated the lurid "begging for mercy on his knees" description several times (J.A.40, 49, 59, 60). In describing the Padgett murder at another point, Judge Olliff wrote, "he endured threats with a loaded pistol, physical beating and abuse, and went through tortuous hours before he was finally shot in the head by the Defendant." (J.A.58). This is as fanciful a description as the statement that Padgett fell to his knees and begged for mercy. No one has ever contended that the Defendant Robert Parker shot Richard Padgett, yet the trial court made such a finding at one point in its sentencing order. Despite the

State's argument that Padgett was not killed for money, but was killed because Groover and Parker were afraid of Padgett's relatives[1] (T.2130-1), the trial court judge found that "the only reason for this murder was the non-payment of a drug debt." (J.A.60).

Another glaring error is found in the description of the Dalton homicide. The sentencing order states that the Dalton homicide was the result of a plan between Groover and Parker, states that Dalton "begged for mercy," and indicates that her murder was premeditated by the Defendant Robert Parker (J.A.40-1, 49, 53). The judge's order essentially tracks Joan Bennett's testimony concerning the Dalton homicide, yet the jury clearly rejected her testimony in acquitting the Defendant of first degree murder. The trial court judge completely ignored the jury's finding that Robert Parker was not guilty of premeditated murder in the death of Jody Dalton.

Not only were the "facts" as alleged by Judge Olliff in his sentencing order not accepted by the Florida Supreme Court or the District Court judge, it is clear that they were also not accepted by the jury that heard the evidence. To elevate the trial judge's sentencing order to the status of the "facts of the case" is to give it weight that was never intended or anticipated. The purpose of the sentencing order is to state the aggravating and mitigating circumstances found by the trial court so that the Florida Supreme Court can intelligently review the sentence. Section 921.141, Florida Statutes (1981). Even a cursory review of the trial transcript shows that the findings made by the trial court in its sentencing order are not fairly supported by the record.

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[1] This argument was necessitated by evidence that Padgett's wallet containing $16 was found on his body (T.1117-8).

ARGUMENT I

THE STANDARDS USED BY THE FLORIDA SUPREME COURT TO APPROVE OR DISAPPROVE A DEATH SENTENCE IMPOSED BY A TRIAL JUDGE DESPITE A JURY'S RECOMMENDATION OF LIFE ARE SUBJECT TO EIGHTH AMENDMENT REVIEW; AND THE AFFIRMANCE OF PETITIONER'S DEATH SENTENCE WAS BASED UPON AN UNCONSTITUTIONAL APPLICATION OF THOSE STANDARDS.

Respondents take the position that the standards used by the Florida Supreme Court to approve or disapprove a death sentence are simply matters of state law not subject to federal review under the Eighth and Fourteenth Amendments (R.B.20). This argument stems from an apparent misunderstanding of this Court's holding in *Spaziano v. Florida,* 468 U.S. 447 (1984) (R.B.23-6). The State's interpretation of *Spaziano* was shared by neither the District Court judge (J.A.140, n.29), nor by the Eleventh Circuit Court of Appeals:

> The Court's conclusion that Florida's override scheme is constitutional did not end its inquiry. Procedures that result in the constitutional application of the death penalty if followed correctly may result in the unconstitutional application of the death penalty if followed incorrectly. The Court therefore examined the record of the particular case before the Court and concluded that the application of Florida's scheme did not result in the arbitrary or discriminatory application of the death penalty. See, *id.*, at 466, 104 S.Ct. at 3165 ("We see nothing that suggests the application of the jury override procedure has resulted in the arbitrary or discriminatory application of the death penalty, either in general *or in this particular case*") (J.A.156).

This Court in *Spaziano* clearly went beyond a simple examination of the constitutionality of Florida's jury override scheme per se, and examined the application of the jury override scheme to the facts of the case before it.

Robert Parker's position before this Court is consistent with this Court's decision in *Spaziano,* not foreclosed by it.

The Respondents' contention before this Court is that a jury override death sentence, once approved by the Florida Supreme Court, is insulated from further federal review, no matter how arbitrary, capricious, or discriminatory the decision. The State's reliance on this extreme position points out the weakness of its case if the application of the *Tedder* standard to Mr. Parker's case is subjected to federal review. The Respondents cite *Lewis v. Jeffers,* 110 S.Ct. 3092 (1990), as if it supports their contention that the standards used by the Florida Supreme Court to approve death sentences are not subject to federal review (R.B.22-3). However, applying *Lewis v. Jeffers* to Mr. Parker's case would require that the death sentence be vacated. In *Lewis v. Jeffers,* this Court held, contrary to the Respondents' assertion here, that a State's standard governing the imposition of a death sentence is subject to federal review in one of three ways: (1) where the standard is unconstitutionally vague on its face and has not been construed by the state court in a constitutionally narrow construction, as in *Maynard v. Cartwright,* 486 U.S. 356 (1988); (2) where the state court has adopted a constitutional construction of the standard, but fails to apply that construction to the facts of the individual case, as in *Godfrey v. Georgia,* 446 U.S. 420 (1980); and (3) where the state court has adopted a constitutionally narrow construction of the standard and has applied that construction to the facts of the particular case, but no rational trier of fact could have found the standard applicable based upon the evidence in the record. *Lewis v. Jeffers,* at 3098-3104. The State makes no contention that the standard used by the Florida Supreme Court to review a jury override death sentence[2] is not unconstitutionally vague

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[2] . . . "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State,* 322 So.2d 908, 910 (Fla.1975)

on its face. The State makes no contention that the narrowing construction of the *Tedder* standard developed in *Richardson v. State,* 437 So.2d 1091, 1095 (Fla.1983) – the "reasonable basis" test – was in fact applied by the Florida Supreme Court in this case.[3] The State further makes no contention that this case does not fall into the *Lewis v. Jeffers* category two described above. Instead, in apparent recognition of the weakness of their position if the application of the *Tedder* standard in this case is subjected to federal review, Respondents argue solely that there can be no federal review.

Respondents' argument is belied by *Godfrey v. Georgia, Maynard v. Cartwright, Lewis v. Jeffers,* and *Clemons v. Mississippi,* 110 S.Ct. 1441 (1990). Of course, federal review is limited to federal constitutional error. That is the holding of *Gryger v. Burke,* 334 U.S. 728 (1948), quoted extensively at R.B.21-22; Petitioner has no quarrel at all with *Gryger.* Both the limits of federal review and its legitimacy within those limits were thoroughly discussed in *Lewis v. Jeffers, supra.* Petitioner seeks exactly the sort of review described in *Jeffers,* nothing more or less.

Apparently as an aside, the Respondents assert that the mitigating evidence in Robert Parker's case was "de minimus." The State asserts that Parker "enjoyed a normal childhood." Presumably, it is normal for a child to grow up in a home with an alcoholic father who beats his mother in his presence, and encourages him to drink from the time he is old enough to walk. Presumably, it is a normal childhood for a boy to be forced to drop out of high school at the age of 16 because his adult girlfriend is pregnant. Presumably, it is normal for an older woman to encourage a 14 year old boy to use drugs to the extent that the boy is addicted by the age of 16. The Petitioner

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[3] This is not surprising, because the Florida Supreme Court makes no mention of any "reasonable basis" analysis, nor does it perform any "reasonable basis" analysis in its opinion (J.A.71-2).

sincerely hopes that the majority of children in this country do not have such "normal" childhoods. Equally incongruous is the State's apparent contention that the uncontroverted evidence of intoxication (a possible statutory mitigating circumstance), as well as the fact that the triggerman received a plea bargain to a lesser sentence while Robert Parker received a death sentence despite the fact that he personally killed no one, were "de minimus" mitigating factors. Such factors may appear de minimus to Respondents, but they were obviously considered significant by the jury. As demonstrated in Petitioner's initial brief, these mitigating circumstances have consistently been found to be sufficient to constitute a reasonable basis for a jury life recommendation prohibiting a jury override.

The State contends that the trial court's silence concerning non-statutory mitigating circumstances should not be interpreted as a failure to consider and weigh the non-statutory mitigating evidence. This argument ignores the admission by the Florida Supreme Court in *Downs v. Dugger*, 514 So.2d 1069 (Fla.1987), to the effect that the state supreme court did not require the judge or jury to actually weigh non-statutory mitigating evidence, but only required that the defendant be permitted to present non-statutory mitigating evidence, before this Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). *Downs, id.*, at 1071. The State makes no effort to justify the Florida Supreme Court's pre-*Hitchcock* decisions in cases such as this one. Requiring a judge who wants to impose a death sentence to give any weight to uncontroverted mitigating evidence, especially non-statutory mitigating evidence, has been a continuing problem in Florida. See, *Waters*, "Uncontroverted Mitigating Evidence in Florida Capital Sentencings," *The Florida Bar Journal* (January 1989). The Florida Supreme Court has finally acted to correct this problem by establishing guidelines requiring a sentencing judge to expressly evaluate each mitigating circumstance proposed by the defense in a written order. *Campbell v. State*, ___ So.2d ___, 15 FLW S342 (Fla.1990).

The State likewise makes no attempt to explain or justify the aberrational application of the *Tedder* standard in 1984 and 1985, as described in *Cochran v. State*, 547 So.2d 928, 933 (Fla.1989). This is significant because the State suggests that death penalty sentencing schemes should be subject to federal review "only when they are of such a nature as *systematically* to render the infliction of a cruel punishment 'unusual.' " *Walton v. Arizona*, 110 S.Ct. 3047, 3066 (1990) (Scalia, J. concurring). Even applying this standard, it would appear that the aberrant review of jury overrides conducted by the Florida Supreme Court during 1984 and 1985, in combination with the Court's failure to require judges to give weight to non-statutory mitigating evidence, did indeed result in a systematic misapplication of Florida's death penalty at the time that Robert Parker's appeal was decided. As demonstrated by *Downs*, *Cochran*, and *Campbell*, these shortcomings have apparently been corrected. This prospective correction of the problem offers no relief for Robert Parker, however. Under these circumstances, federal review is not only permissible, it is necessary.

The weakness of the State's position on this issue is also demonstrated by its complete failure to attempt to explain why reversal is not mandated under *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990). The State makes no attempt to reconcile the Florida Supreme Court's review of Robert Parker's death sentence in this case with this Court's ruling in *Clemons*, because it cannot be reconciled.

To reiterate, Respondents take the extreme position that the application of the *Tedder* standard by the Florida Supreme Court is not subject to federal review under the Eighth or Fourteenth Amendments. This position is an implicit recognition that, if a *Lewis v. Jeffers* analysis is performed, reversal is mandated. Respondents' apparent "fallback" position is to ask this Court to adopt Justice Scalia's concurring opinion in *Walton v. Arizona* as the standard for federal review of state court death sentences. Though Petitioner believes that reversal of his death sentence is required even under this standard, the

State is asking this Court to create new law and to ignore established precedent. In *Spaziano v. Florida*, this Court reviewed the *Tedder* standard as applied to the facts of that individual case. In *Lewis v. Jeffers*, this Court established a three step analysis of state court death penalty standards to determine their constitutional validity, both on their face and as applied. In *Clemons v. Mississippi*, this Court ruled that the Eighth Amendment prohibits the automatic affirmance of a death sentence simply because there are one or more remaining valid aggravating circumstances after other aggravating circumstances have been found improper. To uphold Petitioner's death sentence, the Respondent can only ask this Court to break new ground in death penalty jurisprudence. The desperation of Respondents' position points out the strength of Petitioner's. The death sentence here must be vacated.

ARGUMENT II

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S CONSTITUTIONAL CLAIM AGAINST AN EVIDENTIALLY UNSUPPORTABLE FELONY MURDER CONVICTION WAS NOT PRESENTED TO AND DECIDED BY THE FLORIDA SUPREME COURT ON DIRECT APPEAL AND THAT, EVEN IF THE CLAIM WAS PROPERLY PRESERVED ON APPEAL, IT WAS PROCEDURALLY BARRED BY PETITIONER'S FAILURE TO RE-RAISE IT IN STATE POST-CONVICTION PROCEEDINGS.

Respondents' discussion of this issue evidences either a frightening ignorance of the trial record or a deliberate attempt to mislead the Court. Petitioner's Argument II applies only to Count II of the Indictment, the murder of Nancy Sheppard. Respondents discuss Petitioner's trial level request for a jury instruction on the "independent intervening act" defense to felony murder as if it was somehow related to Petitioner's defense to Count II (R.B.12-14). The independent act defense was not Petitioner's defense to Count II, but was the defense to Count I, the murder of Richard Padgett, and Count III,

the murder of Jody Dalton. Petitioner raised the issue of the trial court's failure to give the independent act instruction as a separate issue on direct appeal, which the Florida Supreme Court recognized had nothing to do with Petitioner's defense to the Sheppard murder (J.A.66-7). This fact was recognized not only by the Florida Supreme Court, but also by the District Court in its discussion of the denial of the independent act instruction (J.A.137-8). Likewise, the Eleventh Circuit recognized that the independent act instruction related to the Padgett murder, not the Sheppard murder (J.A.167-8). The trial court's failure to give the independent act instruction as a defense to the Padgett murder is not an issue before this Court, and has absolutely nothing to do with the sufficiency of the evidence to support a felony murder instruction in the Sheppard murder.

Despite the fact that the denial of an independent act defense instruction and the giving of a felony murder instruction that was unsupported by the evidence are two separate and distinct issues relating to two separate and distinct homicides, Respondents argue that the only issue raised before the trial court, the Florida Supreme Court, and the District Court, was the denial of the Petitioner's requested independent act instruction (R.B.12-15). The State then asserts that the *Stromberg*[4]/due process argument concerning the sufficiency of the evidence to support the felony murder instruction was raised for the first time in Petitioner's Eleventh Circuit brief (R.B.31). Despite Respondents' contention that the issue was not raised at trial, the record of the charge conference clearly demonstrates that defense counsel objected to the giving of the felony murder instruction on the grounds that it was not supported by the evidence (J.A.3-5). The record demonstrates that the State requested that the jury be instructed on the underlying felony of kidnapping as to the Padgett murder and robbery as to the Sheppard murder (J.A.3-5). Petitioner objected to the felony murder

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[4] *Stromberg v. California*, 283 U.S. 359 (1931).

instruction as to both homicides, on the grounds that " . . . there is no evidence that there was a kidnapping or that there was a robbery in any of these murders." (J.A.4). The trial court recognized this objection several times during the charge conference and overruled it each time (J.A.5, 8, 10). On direct appeal, the Florida Supreme Court unequivocally found that the evidence was insufficient to support the robbery felony murder finding in the death of Nancy Sheppard (J.A.70-1).

The State argues that, on rehearing, Petitioner "did not argue any even remotely fashioned *Stromberg* theory." (R.B.30-1). A review of the motion for rehearing, however, clearly shows a discussion of the felony murder instruction as it applied to the Sheppard murder (J.A.81-3) in which the Petitioner summarized the problem as follows:

> This court, in page 6 of its own opinion, ruled that there was no felony involved in the Sheppard murder, and struck felony murder as an aggravating circumstance. *The lower court was therefore incorrect in instructing the jury on felony murder.* The State conceded in its brief that, under *Goodwin v. State*, 405 So.2d 170 (Fla.1981), duress *is* a defense to felony murder (S.B.6). The jury was therefore instructed in a legally incorrect and factually misleading matter in two critical areas relating to the Sheppard murder. Not only was the jury told that a lawful defense supported by the evidence was not a defense at all, *but they were permitted to convict the defendant on a theory of liability that was not supported by the evidence.* (J.A.82).

Petitioner went on to state that the appellate court's disposition of his case violated his constitutional right to due process of law, specifically citing his right to notice of the charges and an opportunity to defend against them. (J.A.83). The Respondents' assertion notwithstanding, the District Court found that "Petitioner's trial counsel clearly raised his objections" and that "the Florida

Supreme Court could not have overlooked the presence of these issues." (J.A.103).

Respondents make the further assertion that Petitioner did not make his *Stromberg*/due process claim in the U.S. District Court (R.B.31). In fact, the issue was raised as Petitioner's ground one in his habeas petition, and briefed in a memorandum of law filed concomitantly with it. In its order denying relief, the District Court judge discussed *Stromberg* at length, based upon Petitioner's arguments. (J.A.130-6). The District Court discussed this issue extensively on the merits, because it found that the law of procedural default concerning this claim was "unsettled." (J.A.102-4). Contrary to Respondents' assertion, the District Court noted that the *Stromberg* claim was raised in Petitioner's motion for rehearing of his direct appeal. (J.A.102).

In addressing the merits, Respondents claim that *Stromberg* only applies to cases involving "laws governing multiple activities, some of which were protected or not illegal." (R.B.34). The State apparently misinterprets *Stromberg* to require that the alternative theory be constitutionally protected, as opposed to simply unsupportable by the law or evidence. In *Yates v. U.S.*, 354 U.S. 298 (1957), this Court relied upon *Stromberg* to reverse a conspiracy conviction where the statute of limitations had run as to one of the two charged objectives of the conspiracy, and it was impossible to know which objective was the basis for the jury verdict. In *Mills v. Maryland*, 108 S.Ct. 1860 (1988), this Court cited *Stromberg* and *Yates* in support of the following proposition:

> With respect to findings of guilt of criminal charges, the Court consistently has followed the rule that the jury verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied on by the jury in reaching the verdict. *Id.*, at 1866.

The Eleventh Circuit has determined that *Stromberg* applies to situations in which an erroneous felony murder instruction is given. See, *Adams v. Wainwright*, 764 F.2d 1356 (11th Cir.1985). Other circuit courts have likewise concluded that liability need not be based on a constitutionally protected activity in order for *Stromberg* to be applicable. See, *U.S. v. Beasley*, 585 F.2d 796, 798 (5th Cir.1978) ("Where it is impossible to determine whether a jury verdict rested on permissible or impermissible considerations, a conviction based on that verdict must be reversed.").

However, even if *Stromberg* was interpreted as requiring one of the theories of liability to be unconstitutional as opposed to simply "unsupportable," *Stromberg* would be applicable in this situation. Under *Jackson v. Virginia*, 443 U.S.307 (1979), a conviction based on less than proof beyond a reasonable doubt is itself unconstitutional. Because the Florida Supreme Court has already determined that the evidence as to the robbery felony murder did not meet the reasonable doubt standard (J.A.70-1), a conviction based on that theory would be unconstitutional under *Jackson*. When a general verdict is based on two theories of liability, one of which is unconstitutional, the conviction violates *Stromberg*. That is precisely the situation here.

Respondents assert that a finding by the Florida Supreme Court that there was insufficient evidence to support the robbery felony murder aggravating circumstance is somehow different from a finding that the evidence was insufficient to support a conviction for robbery felony murder. The Eleventh Circuit has examined the issue of whether the felony murder aggravating circumstance in Florida's death penalty statute is identical to the felony murder offense under Florida law. In *Delap v. Dugger*, 890 F.2d 285 (11th Cir.1989), the court squarely held that they were identical: "We conclude that the felony murder aggravating circumstance is coextensive with a felony murder theory of prosecution." *Id.*, at 315.

The State in turn argues that "the mere rejection of robbery as an aggravating sentencing factor does not mean that no evidence (guilt phase) of felony murder was on the record." (R.B.36). This argument seems to suggest that Petitioner's conviction could have been based on an underlying felony other than robbery. Once again, Respondents' ignorance of the trial record is demonstrated. At the charge conference, it was determined by the trial court judge that the underlying felony upon which the jury would be instructed as to the Padgett murder was kidnapping, and the underlying felony that the jury would be instructed upon as to the Sheppard murder was robbery (J.A.8; R.388-90). The only underlying felony that was argued by the State to the jury as a theory of liability in the Sheppard murder was robbery (T.2274-5). Thus, the only underlying felony upon which Petitioner's conviction in the Sheppard murder could have been based was robbery.

The validity of Petitioner's claim on the merits is evident. Only if one accepts the distorted case history presented by Respondents can the procedural default ruling of the lower court be sustained. Petitioner's claim is neither procedurally barred nor devoid of merit, and requires a new trial on Count II.

ARGUMENT III

WHERE THE JURY WAS PERMITTED TO CONVICT PETITIONER OF FIRST DEGREE MURDER ON EITHER A FELONY MURDER THEORY OR A PREMEDITATED MURDER THEORY, THE COURT OF APPEALS ERRED IN HOLDING THAT THE AVAILABILITY OF THE LATTER THEORY MADE IT HARMLESS ERROR TO INSTRUCT THE JURY TO COMPLETELY DISREGARD PETITIONER'S DEFENSE TO FELONY MURDER.

Respondents' brief fails to even address the propriety of the trial court giving its "duress is not a defense" instruction. Instead, the State's sole response is that duress is not a defense to felony murder:

> The State of Florida stands as one of the majority of jurisdictions which does not recognize "duress" as a defense to first degree murder. Even at common law "duress" was not recognized as a valid defense. (R.B.37).

Respondent cites LaFave, *Substantive Criminal Law*, Section 5.3 (West Publishing Company 1986), for this proposition. Contrary to Respondent's position, LaFave unequivocally states that duress *is* a defense to felony murder: " . . . duress is no defense to the intentional taking of life by the threatened person; but it is a defense to a killing done by another in the commission of some lesser felony participated in by the defendant under duress." LaFave, at 618. In another respected hornbook, Professor Rollin Perkins describes the State's position as follows: "*Another unsound suggestion, occasionally encountered*, is that compulsion cannot be recognized as an excuse in a prosecution for felony murder even if the defendant did not do the killing himself and joined others in their wrongdoing only to save his life." Perkins, *Criminal Law*, Ch.9, Sec.2(c) "Compulsion" (The Foundation Press, Inc. 1969). Significantly, both LaFave and Perkins refer to *People v. Merhige*, 212 Mich. 601, 180 N.W.418 (1920). The *Merhige* decision was also cited by the Florida appellate court in support of the proposition that duress can be a defense to felony murder. See, *Wright v. State*, 402 So.2d 493, 498-9 n.8 (Fla.3d DCA 1981).

The State's assertion that the duress instruction approved by the Florida Supreme Court in *Goodwin v. State*, 405 So.2d 170 (Fla.1981), related to a charge of kidnapping, not murder, is simply wrong. A review of the opinion shows that the defendant Goodwin was charged with three counts of first degree murder, *not* kidnapping. *Goodwin*, at 170. The jury in *Goodwin* was instructed that duress was a defense to kidnapping, which was the underlying felony in the three homicides. The Supreme Court in *Goodwin* noted that "the trial judge properly instructed the jury on the defense of duress . . . ," that

"the sole defense of the appellant was coercion and this was rejected by the jury," and, finally:

> There was an abundance of testimony as to the fear that appellant had of (co-defendants) Steinhorst and Hughes. Although the jury rejected this fear as coercion by its verdict of guilty, its recommendation of a sentence of life imprisonment could have indicated that the jury thought that fear had motivated appellant's participation in the tragic events. *Goodwin*, at 172.

Respondents' assertions to the contrary, a review of the opinion in *Hawkins v. State*, 436 So.2d 44 (Fla.1983), clearly discloses that it was a felony murder case wherein the defendant was permitted to assert a duress defense that was rejected by the jury:

> On the issue of his convictions, Hawkins asserts that none of his convictions are proper because he conclusively established that he acted under duress exerted by his co-defendant, Troedel. We disagree. The evidence was clearly sufficient for the jury to conclude that Hawkins acted *voluntarily* in participating in the burglary and robbery and the felony murders. In this state, when a person *voluntarily* participates in a robbery, that person is guilty of first degree felony murder when a killing occurs during a commission of that robbery even though he did not actually do the killing because 'the felony murder rule and the law of principles combine to make a felon generally responsible for the lethal acts of his co-felon.' (Citations omitted.) *Hawkins, id.*, at 46.

The Florida Supreme Court in *Hawkins* clearly stated that it is *voluntary* participation in an underlying felony that subjects a defendant to liability for a killing committed by a co-felon. The duress defense, of course, negates that "voluntary participation" element of felony murder.

Respondents cite no authority holding that duress is not a defense to felony murder. As shown in the *Goodwin* and *Hawkins* decisions, other defendants in other trial courts in Florida have been permitted to use duress as a

defense to felony murder. Nevertheless, Robert Parker's jury was instructed that duress was not a defense to any form of murder (R.320). The Petitioner was denied his right to present a defense, and is entitled to a new trial as to Count II.

ARGUMENT IV

PETITIONER WAS DENIED DUE PROCESS WHEN THE PROSECUTOR WAS PERMITTED TO CROSS EXAMINE HIM ABOUT THE FACT THAT HE HAD CONFERRED WITH DEFENSE COUNSEL DURING A RECESS IN HIS TESTIMONY, ALTHOUGH THE CONFERENCE HAD BEEN AUTHORIZED BY THE TRIAL JUDGE AND ALTHOUGH THE PROSECUTOR OFFERED NO GOOD FAITH BASIS FOR ASSERTING THAT IT INVOLVED ANY CONDUCT LEGITIMATELY RELEVANT FOR IMPEACHMENT.

Respondents attempt to justify the cross examination of the Defendant with two arguments: (1) the trial court judge should not have permitted the Defendant to consult with counsel during a recess, and (2) "a defendant who takes the witness stand is in the same position as any other witness." (R.B.43). Respondents may be correct that the trial court judge would not have been obligated to permit Petitioner to talk with his lawyer during this recess, based upon this Court's decision in *Perry v. Leeke*, 109 S.Ct. 594 (1989)[5]. This contention is completely beside the point, however. Even if the trial court judge was mistaken in ruling that Petitioner had the right to confer

[5] At the time of Petitioner's trial, he unquestionably had an absolute right to consult with counsel during any recess in the trial. See, *Thompson v. State*, 507 So.2d 1074 (Fla.1987); *Bova v. State*, 410 So.2d 1343 (Fla.1982). *Perry* certainly does not stand for the proposition that a trial court may not permit a defendant to consult with his lawyer during a recess in the trial. Perry simply states that a trial court judge has the discretion to prohibit consultation during a very brief recess in the trial, while the defendant is on cross examination.

with his lawyer, the State is not permitted to take advantage of the judge's mistake by using against Petitioner his exercise of the right that the judge's ruling told him he had. See, *Johnson v. U.S.*, 318 U.S. 189 (1943). To permit the State to attack a defendant in this fashion would be the "indefensible sort of entrapment by the State," condemned in *Raley v. Ohio*, 360 U.S. 423, 426-7 (1959).

The State's second argument, that a defendant is like any other witness when he takes the witness stand, was rejected by this Court in *Geders v. U.S.*, 425 U.S. 80 (1976):

> The petitioner was not simply a witness; he was also the defendant . . . a non-party witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. *Id.*, at 88.

Respondents are apparently asking this Court to recede from its previous decisions that unequivocally reject the proposition that a defendant in a criminal case is like any other witness when he takes the witness stand. See, *Rock v. Arkansas*, 483 U.S. 44 (1987); *Doyle v. Ohio*, 426 U.S. 610 (1976). Respondents contend that it is impractical to require a prosecutor "to proffer some evidence of 'coaching' before being allowed to cross examine on that issue [because] . . . the State has no access to attorney-client communications and cannot listen in on their conferences" (R.B.43). The solution to this supposed problem is obvious. All that a prosecutor who wishes to cross examine a defendant on "coaching" needs to do is to ask the trial judge's permission to question the defendant on this subject in the absence of the jury. If such questioning develops any colorable basis for a factual assertion that "coaching" or other discrediting conduct occurred during an attorney-client consultation, the judge can then allow cross examination on the consultation in the jury's presence. If it does not – if, as in the present case, nothing but factually indefensible innuendo is produced – the prosecutor should not be allowed to cross examine on the consultation in front of the jury.

The prosecutor here made no effort to determine whether any sort of improper conduct between Petitioner and his lawyer had occurred during the recess. The prosecutor instead simply accused the Petitioner of being "well coached," then brought out the fact that he had talked to counsel during the recess, as if the fact that he talked to his lawyer was alone sufficient to demonstrate that improper coaching had occurred (J.A.26-9). This was not a cross examination "likely to lead to the discovery of truth." *Perry, id.*, at 601. This was no more than a shoddy trick in which the prosecutor was attempting to mislead the jury into believing it should infer impropriety from the mere fact that Petitioner spoke to his lawyer after obtaining permission from the judge. It is a "when did you stop beating your wife?" type of interrogation that tends to subvert, rather than to enhance, the truth seeking process. A new trial is in order.

CONCLUSION

Respondents' brief presents weak arguments that would require departure from established precedent in order to affirm Petitioner's convictions and sentence. Based on the facts as they appear in the trial record, and the authorities and arguments cited above, Petitioner's prayer for relief should be granted.

Respectfully submitted,

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